IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1105

ANTHONY HERBERT,

Petitioner,

—against—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

Defendants,

BARRY LANDO, MIKE WALLACE and CBS INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioner, Anthony Herbert ("Herbert"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit reversing and remanding the order of the United States District Court for the Southern District of New York and prohibiting inquiry during discovery into the publisher's state of mind in this action governed by the principles of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is unreported and is reproduced in Appendix A (1a-52a) of this Petition. The opinion and order of the District Court denying defendants' motion to restrict discovery is reported at 73 F.R.D. 387 (S.D.N.Y. 1977) and is reproduced in Appendix B (53a-89a). The opinion and order of the District Court certifying its prior opinion and order is unreported and is reproduced in Appendix C (90a-98a).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 7, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented for Review

1. Whether the ruling of the Court of Appeals, by creating an absolute privilege to *Sullivan* libel defendants not to disclose their state of mind, has upset the constitutional balance, struck by *New York Times* v. *Sullivan* and its progeny, which permits liability for defamatory falsehood under the reckless disregard branch of actual malice where plaintiff has satisfied the heavy burden of proof regarding the reporter's subjective state of mind?

2. Whether the ruling of the Court of Appeals has misapplied decisions of this Court regarding First Amendment protections of the media in other areas in creating an absolute privilege of non-disclosure of the reporter's state of mind in *Sullivan* libel cases?

3. Whether the ruling of the Court of Appeals, by prohibiting direct proof of defendant's subjective state of mind in a *Sullivan* libel case, has substantially eliminated the

possibility of liability under the Supreme Court's subjective test for establishing liability based upon reckless disregard?

4. Whether the ruling of the Court of Appeals has immunized from liability all malicious defamations where the basis for liability arises during the editorial process?

Statement of the Case

Herbert, a Retired United States Army Lieutenant Colonel, brought this defamation action under 28 U.S.C. §1332(a) against respondents ("defendants") and Atlantic Monthly Company for a broadcast entitled "The Selling of Colonel Herbert", presented by CBS on its 60 MINUTES Program ("Program") and produced by Mike Wallace and Barry Lando, and an article published by Atlantic Monthly and written by Lando.

The Complaint

The complaint alleges that Herbert enlisted in the U.S. Army at the age of 17 and rose through the ranks to become a Lieutenant Colonel. He spent 24 years in military service, and gained the highest professional reputation among his fellow soldiers and officers, as well as among the general public. He was the recipient of many awards and citations and during the 1950's toured much of the world on behalf of the United States Army. From September, 1968 to April, 1969 Herbert served with the 173rd Airborne Brigade in Viet Nam. On April 4, 1969, Herbert was relieved as Commander of the 2nd Battalion and was given a bad efficiency report. While in Viet Nam, Herbert reported to his superior officers atrocities committed and permitted by United States forces in violation of international law and military regulations. After his relief from command, Herbert attempted to process charges against his superior officers, General John W. Barnes and Colonel J. Ross Franklin, for failing to act upon his re-

ports and complaints and for covering up the charged atrocities. After months without any indication of action, Herbert filed a formal complaint with the Inspector General's Office in Ft. McPherson, Georgia against Franklin and Barnes. In March of 1971, Herbert brought formal charges at the U.S. Army Criminal Investigation Division (CID). Television and newspaper publicity regarding these charges followed. The Army conducted an investigation resulting in the dismissal of the charges. Ultimately, the Army itself conceded that 7 of the 8 incidents which Herbert charged his superiors had covered up did occur in the 173rd area of operations.

On February 4, 1973, CBS presented "The Selling of Colonel Herbert" as a factual report of its investigation into the validity of Herbert's allegations. The complaint alleges that the program falsely and maliciously depicted Herbert as a liar in his assertions that he had reported many atrocities to Col. Franklin or General Barnes, as a man capable of brutality to Vietnamese prisoners, and as a person who had used the war crimes charges as an excuse for his relief from command. As a result of the Program, Herbert's reputation was destroyed and he sustained severe financial loss.*

Discovery and the State of Mind Issues

During discovery, defendants objected to certain of Herbert's Rule 34 requests and to certain questions asked at the depositions of Lando and Wallace. These questions, in the main, focused upon Lando's state of mind during the preparation and presentation of the Program. More specifically, these inquiries involved Lando's conclusions regarding people or leads to be pursued or not to be pursued and facts obtained from interviewees; his view of the veracity of persons interviewed; the bases for some of his conclusions; conversations between Lando and Wallace on matters to be included or excluded from the broadcast; and Lando's intentions in including or excluding certain materials.* These questions related to matters presented on the Program and conflicting or impeaching matters not presented and sought to ascertain whether Lando was subjectively aware of the probable falsity of statements presented on the broadcast by directly ascertaining Lando's state of mind on these matters. The importance of the now prohibited questions to a plaintiff's ability to satisfy the heavy burden of proving actual malice is highlighted by a brief description of the context of many of these questions.

* The answers of the defendants raised several affirmative defenses, including the First and Fourteenth Amendments to the United States Constitution.

Prior to the presentation of the Program, Lando had obtained or seen a filmed statement by one of Herbert's company commanders that Herbert warned him never to have his command involved in any atrocities; a sworn statement by another of Herbert's company commanders that he was constantly being reminded by Herbert to watch out for the safety of the civilian population; a sergeant's statement that an angry Herbert had spoken to his entire Company condemning the murder of Vietnamese detainees on February 14, 1969 at Cu Loi; sworn statements by a Brigade Surgeon and by a Battalion Surgeon of Herbert's concern for good medical care and treatment of the Vietnamese population; a helicopter pilot's statement of Herbert's briefing to the pilots not to shoot Vietnamese civilians or detainees and of Herbert's humane treatment of the Vietnamese.

None of these statements is presented, referred to or quoted from on the Program. Instead, the Program presented a filmed statement by General Barnes that "[Herbert] was a killer" and a comment by Wallace that there are men "who claim that Herbert was an officer who could be brutal with captured enemy prisoners himself". Wallace proceeded to present or describe statements from three

* See 19a-20a.

soldiers painting a picture of Herbert as a brutal man. During discovery it was disclosed (a) that the story of one of those soldiers was not supported by anyone and that a number of people had advised Lando that the soldier could not be trusted; (b) that Lando had specifically noted that the story of the second soldier had to be checked as to whether Herbert had actually witnessed the beating involved, yet he was never contacted again even after Lando was told by another soldier that Herbert could not have seen the beating; and (c) that Lando lacked any corroboration of any aspect of the third soldier's story.*

Having discovered these facts, plaintiff then asked Lando at his deposition questions concerning his state of mind on these matters, i.e.; his conclusions, bases and intentions for pursuing, presenting and endorsing statements portraying Herbert as a brutal man, insensitive to the atrocities committed against the Vietnamese, while ignoring and excluding all statements describing Herbert as concerned about the treatment of the Vietnamese population and outraged about atrocities. Plaintiff was seeking by these questions direct proof of the critical issue of whether CBS and its producers Lando and Wallace entertained serious doubts concerning the truth of matters stated and presented on the Program picturing Herbert as a brutal man.

The same context existed for now precluded questions in other areas. During the discovery process it was disclosed that Lando had conducted a second filmed interview of Franklin in which Franklin admitted that he frequently would "tune-out, turn-off" when Herbert was talking and that it was certainly possible that Herbert could have made comments criticizing the ARVN (the South Vietnam Army)

* While the Program never hints that CBS' investigation uncovered anything showing Herbert's consideration for the treatment of Vietnamese prisoners or his activities condemning atrocities, Wallace noted on the Program that several men said "it's not so" in reference to the claim that Herbert himself could be brutal with captured enemy prisoners.

or American advisors about the mistreatment of the Vietnamese.* Through discovery plaintiff for the first time became aware of two sworn statements of Captain Jack Donovan in CBS' possession which stated that Donovan was certain Herbert had complained of the Cu Loi killings to Brigade Headquarters. In the first statement Donovan swore he was certain the report by Herbert was made to Franklin; in the second statement, given after the Army CID called him back, Donovan stated he could not be absolutely certain it was Franklin to whom Herbert was talking, but believed it to be him. During discovery plaintiff also learned of extensive cooperation between CBS and the Pentagon in the preparation for the Program.** It was disclosed, for example, that Pentagon and other Army officers spoke to active-duty men when CBS sought the Army's assistance in locating people to be interviewed, and urged them to cooperate with interview requests; Lando also admitted his knowledge of the Pentagon's extensive animosity toward Herbert which included the organizing of an anti-Herbert "briefing team" which toured Army bases during 1972.

* The February 14 killings at Cu Loi involved South Vietnamese forces accompanied by an American advisor.

** In fact, during the pendency of CBS' motion on the disputed questions and the appeal below, plaintiff, in a Freedom of Information Act suit, ascertained that prior to CBS developing its "investigation," Lando told the Pentagon's Information Officer that Lando's premise was that Herbert was a liar and that there would be no story if Herbert's account could not be "debunked." Thereafter, at the time of his first interview with Franklin in the Pentagon, Lando repeated his interest in debunking Herbert and further told the Information Officer that Wallace "is equally convinced that the story is in debunking Herbert" and that the story "will not go unless he can convincingly portray Herbert as the bad guy." Lando later stated to General Sidle of the Pentagon Information Office that his "piece is aimed at debunking Herbert in his long fight against the Army." These conversations were not disclosed by Lando at his deposition.

On the Program, nothing from Franklin's second interview was noted or excerpted;* rather, the Program presented from Franklin's first interview his assertion that Herbert never discussed war crimes or atrocities with him. Similarly, nothing on the Program even remotely implied that CBS had any statements of anyone who heard Herbert report the Cu Loi killings to Brigade Headquarters; to the contrary, Wallace specifically stated on the Program that none of the men who served under Herbert in Vietnam "were certain that he had actually reported" the February 14 killings. The Pentagon's relationship to the preparation of the Program and its activities regarding Herbert were ignored on the Program except for a denial by Captain Grimshaw that he was under any pressure from Pentagon representatives to show up at the Pentagon for a CBS interview.**

Plaintiff sought to obtain direct evidence of defendants' state of mind as to the truth or falsity of these matters which either appeared on the Program or contradicted material which was broadcast by inquiring as to Lando's conclusions regarding Franklin's second interview, his view of Franklin's veracity and credibility, his intention in excluding from the Program any reference to the Donovan statements, his belief as to the impact of including a reference to Army activities regarding Herbert's charges, his conclusions as to Army activities regarding the preparation of the Program, his views of the veracity of Pentagon representatives, his intention in excluding from the Program any reference by Grimshaw to his discussions with Pentagon officers or to feeling any pressure to support the Army's position.

* Apparently, the Program's viewers were not the only ones deprived of all information concerning the second interview. At his deposition Wallace testified that he did not recall knowing about a second Franklin interview prior to the institution of this action.

** At the time of his interview at the Pentagon Grimshaw also stated that he knew that there were people at the Pentagon who even then "do not like" what he had previously stated in support of Herbert. At a later interview Grimshaw admitted he felt some pressure from having been told by another major he was "dead careerwise" because Herbert had published a Grimshaw statement in his book. At both filmed interviews Grimshaw told of Herbert urging him not to have his company involved in any atrocities. None of these statements appears in any form on the Program.

The Decisions Below

After reviewing the principles of *New York Times* v. *Sullivan* and its progeny, the centrality of the subjective state of mind of the publisher in establishing actual malice under those principles and the particularly heavy burden of proof placed upon *Sullivan* case plaintiffs, the District Court concluded that the defendants must answer the open questions concerning their state of mind. The District Court thereafter amended its prior Memorandum and Order so as to include a finding pursuant to 28 U.S.C. §1292(b) as a prerequisite to an application for an interlocutory appeal. On November 7, 1977, the Court of Appeals issued its decision reversing and remanding the District Court Order and holding that the journalist's opinions, conclusions and thoughts (state of mind) on matters relating to investigation or publication are absolutely privileged from discovery by a *Sullivan* case plaintiff because the First Amendment has immunized the editorial process from judicial scrutiny.

The factual description in Chief Judge Kaufman's opinion is perplexing in its unrestricted adoption of statements made in Lando's disputed Atlantic Monthly article, its misstatements of fact* and its failure to focus on the spe-

* The opinion noted that Lando "produced a laudatory report which was televised on July 4, 1971 over the CBS Network" (15a). No such report exists. Judge Kaufman also wrote that "Lando obtained Franklin's hotel bill and a cancelled check in payment of that bill" (16a); however, on the face of the two documents it is indisputable that a $25.00 balance remained after crediting the amount of the check.

cific factual matters which gave rise to the state of mind questions. For example, while Chief Judge Kaufman noted that a Captain Bill Hill recalled that Herbert reported war crimes to someone but could not say with "total certainty" that Franklin was the individual (16a),* he made no reference to the two sworn statements of Captain Donovan that he was certain Herbert reported the February 14th war crimes to Brigade Headquarters. Nowhere does the opinion specifically consider the critical nature of questions directed to Lando's state of mind concerning these statements in obtaining proof that CBS acted with actual malice when Wallace stated on the Program that "none [of the men who served with Herbert] was certain that he had actually reported [the February 14th killings]".

Similarly, Chief Judge Kaufman described a Lando interview with Bruce Potter (16a-17a) but nowhere in his detailing of the facts does he refer to any of the interviews or statements obtained by Lando from Potter and others which portrayed Herbert as concerned about the treatment of the Vietnamese and angered at the commission of atrocities. The opinion, thus, failed to analyze the concrete factual framework in which inquiry was made relating to Lando's doubts as to the truth of matters concerning Herbert's view of brutality presented on the Program.

Both Chief Judge Kaufman and Judge Oakes, concurring, recognized the significance of the issue determined by the Court of Appeals. The Chief Judge stated that the Court of Appeals had permitted the interlocutory appeal because of

> [t]he critical importance of the issue, whether the First Amendment erects any barriers to discovery of the editorial process. . . . (21a)

* Not even this statement by Captain Hill was included or referred to on the Program.

Judge Oakes noted that he had written a concurring opinion

> [b]ecause this case breaks new ground in an area of utmost importance. . . . (23a)*

REASONS FOR GRANTING THE WRIT

The Creation of an Absolute Privilege of Non-Disclosure of Editorial Judgment in Libel Cases Has Fundamentally Altered the Principles of *New York Times* v. *Sullivan* and Its Progeny.

1. This Court's Delicate Balancing of Important Social Interests from *Sullivan* to the Present Has Never Included a Recognition of the Absolute Privilege Granted by the Court Below.

From the decision in *New York Times* v. *Sullivan* to the present the Supreme Court has sought to fashion principles in the area of libel which balance the concerns of the First Amendment for uninhibited, robust and wide-open debate on public issues with the historic recognition of a right of legal redress to persons damaged by false and defamatory publications.** Striking that balance has led the Court to

* The ground-breaking nature of the decision below was featured in virtually every major media publication. See, e.g., *New York Times*, editorial, "The Limits of Libel," November 10, 1977, p. A22; *Washington Post*, "Extending the Cloak of Press Protection," November 12, 1977, p. A19; *Wall Street Journal*, "Court, in CBS Case, Limits Examination of Journalist's Decision-Making Methods," November 8, 1977, p. 8; *Time*, "The Press," November 21, 1977, p. 103.

** See e.g.: *Rosenblatt* v. *Baer*, 383 U.S. 75, 86 (1966); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341-343 (1974). In *Rosenblatt, supra*, 383 U.S. at 86, Mr. Justice Brennan wrote that "important social values . . . underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation."

grant significant additional protections against liability to those who have published alleged false defamations against public officials and, thereafter, public figures.* Although the position has been urged upon the Court,** a majority of the Justices have never concluded that securing the guarantees of the First Amendment required an elimination of liability to public officials or public figures for libel.

In *Sullivan* the Court concluded that it was essential to establish a "defense for erroneous statements honestly made" *** in order to fulfill the constitutional guarantees. This defense was there formulated as requiring a public official seeking recovery for a defamatory falsehood to prove that the statement was made with " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. . . ." † The substance of reckless disregard has been considered on a number of occasions by the Court. The critical outcome of these considerations has been the formulation of a subjective test in determining the state of mind of the reporter in regard to the truth or falsity of the statements published. In *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964), the Court

* The area encompassed by these additional protections has changed during the years as the Court has sought to refine this balance. Compare: *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976). In *Firestone*, *supra*, 424 U.S. at 456, Mr. Justice Rehnquist described the *Gertz* decision as an attempt to seek "a more appropriate accommodation between the public's interest in an inhibited press and its equally compelling need for judicial redress of libelous utterances." The proper place of plaintiff in relationship to this area has not been determined although it is assumed at this stage that he falls within the area subject to the *Sullivan* principles.

** See Black, J. concurring (with Douglas, J. joining) in *New York Times* v. *Sullivan*, 376 U.S. at 293.

*** *Ibid*, at 278.

† *Ibid*, at 279-280.

described the required state of mind to establish a "reckless disregard for truth" as one where the defendant has made the false statements with "a high degree of awareness of their probable falsity"; in *Curtis Publishing Co.* v. *Butts*, *supra*, 388 U.S. at 153, Mr. Justice Harlan described it as "the publisher's awareness of probable falsity"; Mr. Justice White in *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968) wrote of the required state of mind as one where the publisher "entertained serious doubts as to the truth of his publication," and, finally, the subjective nature of the test was noted in the Court's statement in *Gertz* v. *Robert Welch, Inc.*, *supra*, 418 U.S. at 334 n. 6, that *St. Amant* "equated reckless disregard of the truth with subjective awareness of probable falsity. . . ."

From 1964 to the present the Court has imposed upon plaintiffs in *Sullivan* cases a heavy burden of proof applicable to the evidence a plaintiff must marshal to satisfy the subjective test required for establishing reckless disregard. At no time during these 14 years of decisions has the molding of the subjective state of mind test triggered any accompanying prohibition on the direct proof of that state of mind or any concern that the proof called for by the test will threaten an allegedly immunized area of media activity.

2. The Misapplication of Confidential Source Cases to Establish an Absolute Privilege for Editorial Judgment.

In an effort to support the absolute prohibition on discovery regarding a media defendant's state of mind, Chief Judge Kaufman relies upon *Branzburg* v. *Hayes*, 408 U.S. 655 (1972) as establishing a privilege for the journalist to protect his sources. However, no matter what else can be garnered from the opinions in *Branzburg* one thing is clear: this Court rejected the notion that the media's need to acquire newsworthy material justified an absolute prohibition upon discovery of the newsman's source. To utilize *Branzburg* as a basis for creating an absolute privilege is,

therefore, to stand that case on its head and to give it a meaning contrary to its holding and its written opinions.*

Moreover, Chief Judge Kaufman's opinion ignores the factors particular to a libel suit where discovery is sought of the subjective state of mind of the reporter which distinguish that situation from the usual circumstances where the identity of a confidential source is sought. In the former case, the reporter is a party being asked to account for his or her own activities in publishing statements alleged to be outside of First Amendment protections under *Sullivan* principles; in the latter, the reporter's own activity is not the subject of a claim of wrongdoing and information regarding that activity is normally being sought to assist others in a litigation to which the reporter is not a party.** Similarly, in the case of compelled confidential source disclosure, revelation of sources may well constitute a threat to the journalist's ability to gather news by drying up future sources, regardless of whether or not the activities involved were constitutionally protected because of the absence of actual malice; in the libel situation, the reporter's newsgathering activities remain unaffected and any other activities are only affected

* *Branzburg*, in its citation of *Garland* v. *Torre*, 259 F.2d 545, 550 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958), *supra*, 408 U.S. at 686, specifically recognized that in libel cases the newsman's source is not immune from discovery. See also, *Carey* v. *Hume*, 492 F.2d 631, 637 (D.C.Cir. 1974), *pet. for cert. dismissed*, 417 U.S. 938 (1974); *Caldero* v. *Tribune Publishing Co.*, 98 Idaho 288, 562 P.2d 791, *cert. denied*, 46 U.S.L.W. 3288 (U.S. Oct. 31, 1977).

** These distinctions are noted in *Baker* v. *F&F Investment*, 470 F.2d 778, 783-784 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) and *Apicella* v. *McNeil Laboratories, Inc.*, 66 F.R.D. 78, 81-82 (E.D.N.Y. 1975). *Cervantes* v. *Time, Inc.*, 464 F.2d 986, 992 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), where source disclosure was sought from a party defendant, did not disturb these distinctions. There the Court of Appeals specifically recognized that the First Amendment did not grant to reporters a privilege to withhold their sources in a libel suit but held that in the case before it, where there was no indication that the libel suit had any merit, such disclosure would not be compelled.

when inquiry regarding the journalist's state of mind would disclose evidence relevant to establishing actual malice.* Disclosure of such evidence might affect a reporter in regard to publishing with actual malice in the future; but neither *Sullivan* nor any of its progeny ever extended a constitutional protection to a false and defamatory statement dishonestly made.**

* The imagined chilling effect of judicial scrutiny of the reporter's state of mind, for which no concrete evidence has been presented in this action, is quite strikingly distinct from the documented chilling effect of compelled source disclosure. A 1971 survey of journalists, for example, indicated that more than 90% of those interviewed were more concerned with protecting confidential sources than with protecting the content of confidential information acquired in the newsgathering process. Blasi, "The Newsman's Privilege: An Empirical Study," 70 *Mich. L.Rev.* 277-278 (1971). Despite the demonstrated impact of source disclosure upon press activities, this Court was unwilling in *Branzburg* to grant a Constitutional privilege to the press, while the decision below grants an absolute privilege to the *Sullivan* reporter defendant to refuse to reveal critical state of mind matters arising at any time during the editorial process. See also, *Gilbert* v. *Allied Chemical Corp.*, 411 F.Supp. 505, 510, 511 (E.D.Va. 1976) where, in a non-libel case, the court distinguished a claim of qualified privilege in regard to confidential sources from a claimed privilege of non-disclosure for editorial matters, and refused to grant a privilege for the latter.

** In *Garrison* v. *Louisiana*, *supra*, 379 U.S. at 75, Mr. Justice Brennan wrote:

> Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." Chaplinsky v. New Hampshire, 315 US 568, 572, 86 L ed 1031, 1035, 62 S Ct 766. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constutitional protection.

3. The Misapplication of Cases Concerning Government Attempts to Direct What Shall be Published.

The opinion below also relies upon the decisions of this Court in *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974) and *Columbia Broadcasting System* v. *Democratic National Committee,* 412 U.S. 94 (1973) which afforded the media absolute protection from a particular state activity—requiring the media to publish certain material—as authority for absolute protection of an area of media activity—the editorial process. Contrary to the analysis of the Court below, the grant of absolute protection in those cases was based upon the nature of the state's activity in compelling the media to publish what it otherwise would not (*Tornillo, supra,* 418 U.S. at 256), rather than the premise that the exercise of editorial judgment was immune from post-publication scrutiny. In *Tornillo,* for example, Mr. Justice White, concurring, noted that the decision did "not mean that because government may not dictate what the press is to print, neither can it afford a remedy for libel in any form. . . . [T]he press certainly remains liable for knowing or reckless falsehoods under *New York Times Co.* v. *Sullivan.* . . ." 418 U.S. at 262.*

The opinions in *Nebraska Press Assn.* v. *Stuart,* 427 U.S. 539 (1976) further underline that in determining the scope and depth of the First Amendment protection for media activity it is the nature of the state's attempt to interfere with the activity, rather than the particular media function subject to that interference, which is critical. Chief Justice Burger, writing for the Court, analyzed the long history of First Amendment protections against governmental prior

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* Mr. Justice Brennan, joined by Mr. Justice Rehnquist, concurring, noted that the decision "addresses only 'right of reply' statutes and implies no view upon the constitutionality of 'retraction' statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction," 418 U.S. at 258.

restraints and the very different questions posed by state action in the form of post-publication inquiries into the content of what was published:

> The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a *judgment in a defamation case* is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.
>
> (427 U.S. at 559; emphasis added)

Mr. Justice Brennan, concurring, also emphasized this distinction. Expressing his view that "there can be no prohibition on the publication by the press of any information pertaining to pending judical proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained," 427 U.S. at 588, he specifically noted the existence of other avenues whereby "shabby" reportage may be challenged:

> Of course, even if the press cannot be enjoined from reporting certain information, *that does not necessarily immunize it from civil liability for libel* or invasion of privacy or from criminal liability for transgressions of general criminal laws during the course of obtaining that information.
>
> (*Id.*, n. 15; emphasis added)

The decision below rests upon an analysis of cases in this Court involving protection of the media from certain state activities notwithstanding the express reservations and exclusions of libel suits from the sweep of these decisions. The state action involved herein—a court proceeding to recover damages for libel—clearly is not prohibited

by the First Amendment. *Sullivan* and its progeny permit such proceedings subject to the more restrictive burden of proof and the requirement of actual malice. In permitting such cases, this Court has never limited the anticipated discovery activity of the libel plaintiff on facts directly relevant to matters required to be proven. In short, since defamation actions premised on the actual malice standard are constitutionally permissible, discovery of direct proof of actual malice cannot soundly be said to have an unconstitutional chilling effect on the exercise of First Amendment rights. As stated by Judge Meskill in his dissent:

> Under *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), [Herbert] may prevail if he proves that the defendants acted with "actual malice," that is, knowing or reckless disregard of the truth. The major purpose of this lawsuit, therefore, is to expose the defendants' subjective state of mind—their thoughts, beliefs, opinions, intentions, motives and conclusions—to the light of judicial review. Obviously, such a review has a "chilling" or deterrent effect. It is supposed to. The publication of lies should be discouraged. The discovery by a libel plaintiff of an editor's state of mind will not chill First Amendment activity to any greater extent than it is already being chilled as a result of the very review permitted by *New York Times* v. *Sullivan*.

(46a-47a)

4. The Balance Previously Struck by This Court Has Been Destroyed.

The decision below represents a basic change in the balance of interests struck by *Sullivan* and its progeny. The Court below has imposed a further and monumental burden on libel plaintiffs by prohibiting direct proof of a concededly critical *Sullivan* issue—actual malice. The subjective nature of the state of mind requisite to establishing actual malice means that only the defendant normally is capable of giving

any direct evidence on this issue; to deprive plaintiffs of the opportunity to discover that evidence from defendant is to overwhelmingly tilt the balance in *Sullivan* libel cases in favor of defendants. In his opinion in the District Court, Judge Haight wrote:

> If the malicious publisher is permitted to increase the weight of the injured plaintiff's already heavy burden of proof by a narrow and restricted application of the discovery rules, so that the plaintiff is denied discovery into areas which in the nature of the case lie solely with the defendant, then the law in effect provides an arras behind which malicious publication may go undetected and unpunished. Nothing in the First Amendment requires such a result. (62a-63a)

A further powerful advantage to libel defendants resulting from the decision below is the power given to them to control the direct evidence available at trial on the critical issue of state of mind and to shape it so that only evidence favorable to them will be presented. The prohibition upon plaintiff's inquiring as to defendants' state of mind created by the decision below does not prevent defendants from testifying themselves as to their conclusions, the basis for those conclusions and their intentions when they believe such testimony would be helpful to their case. In fact, in the past, libel defendants during discovery have shown no reluctance to disclose their state of mind under such circumstances.* See e.g.: *Carson* v. *Allied News Co.*, 529 F.2d 206, 211-212 (7th Cir. 1976) (reporter's deposition testimony on "basis" for certain statements in the article); *McNair* v. *The Hearst Corporation*, 494 F.2d 1309, 1311, n.2 (9th Cir. 1974) (publisher's deposition testimony on the

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* Not until the present case has the media indicated any need to protect its "editorial process" from disclosure. As noted by Judge Meskill, "if such a privilege were really necessary to protect the editorial function, we would have heard about it long before now" (51a). *Cf.*, *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 698-699.

"impression" created by the article); *Vandenburg* v. *Newsweek, Inc.*, 441 F.2d 378, 380 (5th Cir.), *cert. denied*, 404 U.S. 864 (1971) (deposition testimony as to reporter's initial belief in plaintiff, subsequent disbelief and confirmation of his doubts); *MacNeil* v. *Columbia Broadcasting System, Inc.*, 66 F.R.D. 22, 25 (D.D.C. 1975) (producer's affidavit on summary judgment motion described his state of mind when he included in the broadcast certain excerpts from a lecture); *F&J Enterprises, Inc.* v. *Columbia Broadcasting Systems*, 373 F.Supp. 292, 298 (N.D. Ohio 1974) (affidavits by Wallace and a producer that they had no reason to doubt the truth of certain matters because of the reputation of the interviewee and that they did not bear any personal malice or ill will towards plaintiff); *Ragano* v. *Time, Inc.*, 302 F.Supp. 1005, 1008-1010 (M.D. Fla. 1969), *aff'd*, 427 F.2d 219 (5th Cir. 1970) (deposition testimony of publisher's vice-president as to why known facts were deleted from a story.)*

Judge Oakes' concurring opinion views the decision of the Court below as "limit[ing] a procedural rule, not . . . alter [ing] the substantive law of libel" (40a, n.28). However, in striking a balance between First Amendment protections and the social values underlying the law of defamation, procedural rules, as well as the substantive law, have been considered by this Court. Thus, the procedural rule governing the nature of the burden of proof to be carried by libel plaintiffs has from *Sullivan* to the present been regarded as one of the important features of the balance drawn by *Sullivan* and its progeny. By adding to the libel plaintiff's burden of proving his case with "convincing clarity," *Sullivan, supra*, 376 U.S. at 285-286, a prohibition against obtaining direct proof of the defendant's state of mind, the

* The media has apparently interpreted the decision below as permitting it, on a case-by-case basis, to determine when to disclose its state of mind and when to remain behind the absolute privilege erected by the decision. See: *The New York Times*, "Libel Case Against CBS Raises Questions About the Release of Data", November 15, 1977, p. 32, col. 6.

decision below does, indeed, rupture the balance which this Court has carefully and arduously constructed since *Sullivan*.*

Further, to view the decision of the Court below as merely a procedural rule regarding an area of proof is to ignore the self-obvious: where the means of proving a particular matter required for establishing liability is foreclosed, then the liability itself has been nullified.** In view of the heavy burden of proof imposed upon a libel plaintiff, and the subjective test for establishing the requisite state of mind for reckless disregard, the decision of the Court below has effectively eliminated liability for reckless disregard by prohibiting direct proof of the requisite state of mind of the defendant. What this Court has declined to do for the fourteen years since *Sullivan*—grant an immunity to the media for publications made with a reckless disregard of their truth—has been effectively accomplished by the decision of the Court below.

5. The Decision Below Has Created Substantial Confusion and Uncertainty in *Sullivan* Libel Cases.

The confusion and potential for abuse arising from the decision of the Court of Appeals furnish additional reasons for this Court to issue the writ of certiorari to review that decision. While the Court below has prohibited compelled disclosure of the "editorial process," the bounds of that

* Judge Oakes further wrote that limiting plaintiff's discovery "may deprive him of adducing the best proof of malice in the common law sense of ill will toward the plaintiff" (41a, n.31). But plaintiff has been foreclosed from questions regarding defendant's state of mind on matters presented on the Program and conflicting matters excluded from the Program; that is, questions directed not to common law malice but to required actual malice under *Sullivan*.

** Edmund Burke put it simply many years ago: "to refuse evidence is to refuse to hear the cause." 1794, Mr. Edmund Burke, Report to the House of Commons, Debrett's History of Hastings' Trial, 1796, pt. VII, Suppl. p. xxiii, 31 Parl.Hist. 324, quoted in I *Wigmore on Evidence* § 10, p. 294 (3d Ed. 1940).

process has not been set. The concept of "editorial process" suffers from a spongey quality which may expand to subsume the entire publishing process.* For example, is a plaintiff foreclosed from all discovery of editorial control and judgment exercised by the reporter in preparing and presenting the publication including: what steps did the reporter determine were necessary to ascertain the truth or falsity of the matters being investigated, which steps were abandoned during the course of the investigation, what means of verification were sought to be followed and what was actually done, how were contradictory materials handled, what factors determined the manner in which contradictory material was treated, how were questions of credibility and reliability of persons interviewed resolved?

The questions triggered by the decision are almost limitless: does the protected area of editorial process include the reporter's pre-investigation conclusion that the only newsworthy publication would be one that portrayed plaintiff as a liar or his conclusion that the only material to be considered for publication is that which supports the particular position of people whose favor the publisher seeks? May a reporter still be asked who he considered interviewing but rejected and who he sought to interview but did not, as well as who he actually interviewed? Can the media, on a case-by-case basis, effectively decide the bounds of the protected area by disclosing some aspects of the editorial process and foreclosing other areas with the claim of privilege?**

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* The decision-making process protected by the decision below has been described as "begin[ning] when a news organization first decides to look into a subject and continu[ing] until the finished product appears in print or is broadcast." *New York Times*, November 15, 1977, *supra*, col. 3.

** Contrary to Chief Judge Kaufman's view (13a; 22a, n.23), the District Court's order does not allow selective disclosure because defendant may disclose any and all other aspects of the editorial process in response to plaintiff's discovery of certain aspects of that process. On the other hand, the Court of Appeals decision necessarily results in selective disclosure since the reporter is free to selectively disclose aspects of the editorial process deemed helpful to the defense while plaintiff is prohibited from discovering any other aspects.

The depth of the protection granted editorial judgment is similarly subject to confusion and abuse. The conclusion that the mere discovery of what occurred during the editorial process so chills First Amendment rights as to require its prohibition necessarily creates a question as to whether any state intrusion regarding that process will be upheld against a First Amendment challenge. Without review by this Court, the decision below may well afford grounds for a finding that government intrusion in the form of a judicial proceeding for damages is constitutionally impermissible where the claim of actual malice is based upon activities occurring during the editorial process. Thus, in addition to the other fundamental changes in the constitutional law of libel effected by the decision below, a major, although ill-defined, area of media activity could be totally removed from any liability that would otherwise arise under *Sullivan* principles.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 28—September Term, 1977.

(Argued September 2, 1977 Decided November 7, 1977.)

Docket No. 77-7142

ANTHONY HERBERT,

Plaintiff-Appellee,

v.

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

Defendants,

BARRY LANDO, MIKE WALLACE and CBS INC.,

Defendants-Appellants.

Before:

KAUFMAN, *Chief Judge,*
OAKES and MESKILL, *Circuit Judges.*

Appeal, pursuant to 28 U.S.C. §1292(b), from an interlocutory order of the United States District Court for the

Southern District of New York, Charles S. Haight, Jr., *J.*, granting appellees' motion to compel discovery.
Reversed and remanded.

Floyd Abrams, New York, New York (Dean Ringel, Kenneth M. Vittor and Cahill, Gordon and Reindel; Carleton Eldridge, Jr., Paul Byron Jones, and Coudert Brothers; Richard G. Green, Adria S. Hillman and Green & Hillman, of counsel), *for Defendants-Appellants Barry Lando, Mike Wallace, and CBS Inc.*

Jonathan W. Lubell, New York, New York (Mary K. O'Melveny, Samuel Estreicher, and Cohn, Glickstein, Lurie, Ostrin & Lubell, of counsel), *for Plaintiff-Appellee, Anthony Herbert.*

Richard Schmidt, Jr., Washington, D.C. (Cohn and Marks, of counsel); Dan Paul, Miami, Florida (Paul & Thomson, of counsel); James C. Goodale, New York, New York; Daniel Feldman, Chicago, Illinois (Isham, Lincoln & Beale, of counsel); Corydon B. Dunham, New York, New York; J. Laurent Scharff, Washington, D.C. (Pierson, Ball & Dowd, of counsel), filed a brief for the American Society of Newspaper Editors, Chicago Sun-Times, Chicago Daily News, The Miami Herald Publishing Co., National Broadcasting Company, Inc., The New York Times Company, and Radio Television News Directors Association, *Amici Curiae.*

Kaufman, *Chief Judge:*

The seemingly narrow issue before us—the scope of protection afforded by the First Amendment to the compelled disclosure of the editorial process—has broad implications. Called upon to decide whether, and to what extent, a public figure bringing a libel action may inquire into a journalist's thoughts, opinions and conclusions in preparing a broadcast, we must address initially the fundamental relationship between the First Amendment guarantee of a free press and the teaching of *New York Times* v. *Sullivan,* 376 U.S. 254 (1964). In accommodating both these interests within our constitutional scheme, we find that due regard to the First Amendment requires that we afford a privilege to disclosure of a journalist's exercise of editorial control and judgment.

I

Almost two centuries ago, James Madison decried the Sedition Act of 1798 as a basic departure from our nation's commitment to a free and untrammeled press. He wrote,

> Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the government contemplates with awful reverence and would approach

> only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press.[1]

The force of his words has not diminished over time. We still recognize that an unrestrained press plays a vital role in the marketplace of ideas and that, without active trade in that marketplace, democracy cannot survive. Cf. *Garrison* v. *Louisiana*, 379 U.S. 74-75 (1964).[2]

Invoking the broad words of the First Amendment, the Supreme Court has never hesitated to forge specific safeguards to insure the continued vitality of the press. It has repeatedly recognized the essentially tripartite aspect of the press's work and function in: (1) acquiring information,[3] (2) 'processing' that information and (3) disseminating the information. The Supreme Court was aware that if any link in that chain were broken, the free flow of information inevitably ceases.[4]

1 VI Writings of James Madison, 1790-1802, p. 335 (Hunt ed. 1906).

2 The notion that the free exchange of information is vital to a democracy is a longstanding principle of the First Amendment. See *Stromberg* v. *California*, 283 U.S. 359, 369 (1931); *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, *J.*, concurring). See also A. Meiklejohn, *Free Speech and Its Relation to Self-Government*, 88-9 (1948).

3 The support given by the press to the passage of "right to know" and "open meeting" statutes is based on its vital need to acquire information. See Note, *Freedom of Information: The Statute and the Regulations*, 56 Georgetown L.J. 56 (1967); Note, *Open Meeting Statutes: The Press Fights for the Right to Know*, 75 Harv. L. Rev. 1199 (1962).

4 See generally Note, *The Rights of the Public and the Press to Gather Information*, 87 Harv. L. Rev. 1505 (1974).

The dissemination of news has long been accorded constitutional protection.[5] In *Near* v. *Minnesota*, 283 U.S. 697 (1931), Chief Justice Hughes, writing for the Court, struck down a Minnesota statute which allowed the state to enjoin the publication of newspapers containing 'malicious, scandalous, and defamatory' matter. The Chief Justice noted that prior restraints on the press were impermissible, notwithstanding the possibility that the information suppressed was libelous. In particular, the fundamental obligation of the press to act as a fourth branch in disclosing official misconduct was stressed:

> The administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials . . . emphasizes the primary need of a vigilant and courageous press. *Id.* at 719-20.

5 The First Amendment cases which protect picketing exhibit like concern with the need to disseminate information. In a landmark case, *Thornhill* v. *Alabama*, 310 U.S. 88 (1940) Justice Murphy wrote,

> In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution . . . Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion on matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. *Id.* at 98-99.

See also *Lovell* v. *Griffin*, 303 U.S. 44 (1938) (an ordinance prohibiting the distribution of "circulars, handbills, advertising, or literature of any kind" invalid on its face as a prior restraint); *Martin* v. *Struthers*, 319 U.S. 141 (1943) (prohibition of door-to-door canvassing for purposes of disseminating religious literature invalid as a prior restraint).

The tenet expressed in *Near* that prior restraints on publication will not lightly be tolerated has, time and time again, been reiterated under circumstances which accentuate Chief Justice Hughes's concerns. See, e.g., *New York Times* v. *United States*, 403 U.S. 713 (1971).[6]

Such anticipatory censorship is not even justified by the presence of a countervailing constitutional interest such as an individual's Sixth Amendment right to a fair trial.[7] Before imposing a gag order, the judges have been admonished that they must carefully consider alternative methods to mitigate the effects of pre-trial publicity. Change of venue and other procedures have been suggested. *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 562 (1976).

Nor has the Supreme Court shown any hesitation to invalidate restraints on the press which do not follow conventional patterns where it finds the free flow of information imperiled. In *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936), the Court struck down a tax imposed by the State of Louisiana on newspaper advertisements because it was graduated to reflect circulation levels.[8] The Court opined that such a tax would lower advertising

6 See also *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139 (1968); *Freedman* v. *Maryland*, 380 U.S. 51 (1965). See, for a historical overview of the prior restraint doctrine, Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Prob. 648 (1955).

7 Of course, the court can exercise its authority to maintain an atmosphere of impartiality and calm in the courtroom. See *Estes* v. *Texas*, 381 U.S. 532 (1965). However, the exercise of such control in no way implies a right to abridge expression itself.

8 The Supreme Court unanimously held the statute invalid. Justice Sutherland, writing for the Court, analogized the statute to pre-Revolutionary "taxes on knowledge" designed to "prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect to their governmental affairs." 297 U.S. 245-46.

revenues and restrict circulation. *Id.* at 244-5.[9] Even the one governmental control—antitrust legislation—that has long been applied to the press and does not contravene the First Amendment has been justified by its instrumental role in insuring the broad distribution of news:

> The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

The acquisition of newsworthy material stands at the other pole of the press's function. Freedom to cull information is logically antecedent and necessary to any effective exercise of the right to distribute news. Indeed, the latter prerogative cannot be given full meaning unless the former right is recognized. See Note, *The Right of The Press to Gather Information*, 71 Col. L. Rev. 838 (1971).

The Supreme Court has acknowledged this compelling need.[10] In *Branzburg* v. *Hayes*, 408 U.S. 655 (1972), the

9 For a collection of materials on the problem of taxation of the press, see T. Emerson, *Political and Civil Rights in the United States*, 602-4 (3d ed. 1967). Many state court decisions have followed *Grosjean*. See, e.g., *Mayor of Baltimore* v. *A.S. Abell Co.*, 218 Md. 273, 287, 145 A.2d 111, 118 (1958).

10 While we discuss only the articulation of this right to gather information as it pertains to the press, the Supreme Court has acknowledged a similar right with respect to free speech. In *Martin* v. *City of Struthers*, 319 U.S. 141 (1943), the Court invalidated a municipal ordinance forbidding door-to-door distribution of handbills as violative of the First Amendment rights of *both* the recipients and the distributors.

Court recognized the right of the press to gather information, since "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. Justice Powell, in a concurring opinion, articulated the principle that news gathering is afforded constitutional protection even in the rare case where a reporter was directed to disclose his sources to a grand jury. He noted that a reporter would not be required to furnish information to a grand jury bearing only a remote and tenuous relationship to the subject matter of its investigation. *Id.* at 711. See also Goodale, *Branzburg* v. *Hayes and the Developing Privilege for Newsmen,* 26 Hastings L. J. 709 (1975).[11]

This court has elaborated on the privilege established by *Branzburg.* In *Baker* v. *F & F Investment,* 470 F.2d 778, 782-3 (2d Cir. 1972), *cert. denied,* 411 U.S. 966 (1973), we held that a reporter did not have to disclose the source of an article he had written about blockbusting in Chicago, although subpoenaed to do so in a class action charging racial discrimination. We noted that "there are circumstances . . . in which the public interest in non-disclosure of a journalist's confidential sources outweighs the public and private interest in compelled testimony." *Id.* at 782. The nature of that public interest was clear: the stream of

11 Although the Court in *Branzburg* expressed the need to protect journalists' sources, it did not suggest that the press enjoyed a special right of access to information not generally available. See also *Saxbe* v. *The Washington Post Co.,* 417 U.S. 843 (1974) (press does not have a constitutional right to interview prison inmates). However, Justice Stewart, who wrote the opinion for the Court in *Saxbe,* subsequently noted that the freedom of the press is a structural provision of the Constitution, and therefore unique. Stewart, *"Or of the Press,"* 26 Hastings L.J. 631 (1975).

information would rapidly run dry if confidential sources, fearing the disclosure of their identities, remained silent.[12]

The constitutional protections afforded the dissemination and acquisition of information has inevitably led the Supreme Court to recognize that the editorial process must equally be safeguarded. The media is not a conduit which receives information and, senselessly, spews it forth. The active exercise of human judgment must transform the raw data of reportage into a finished product. The Supreme Court cases which grant protection to the editor so shaping the news are unequivocal in their terms. In *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), the Court unanimously held that a newspaper could not be compelled by the state to accept editorial replies. The Court recognized that the treatment of public issues and officials —whether fair or unfair—constituted the exercise of editorial control and judgment, and that the existence of a right of reply statute would unconstitutionally burden an

12 Of course, our holding in *Baker* did not depend upon either the New York or Illinois statutes. There, as in *Garland* v. *Torre,* 259 F.2d 545 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958), the First Amendment compelled our conclusion. Under similar circumstances, the disclosure of confidential sources has been privileged. In *Cervantes* v. *Time, Inc.,* 464 F.2d 986, 992-93 (8th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973), the court held that a publisher was not required to disclose his sources since the plaintiff's libel action was not likely to succeed. See also *Apicella* v. *Mac Neil Laboratories, Inc.,* 66 F.R.D. 78 (E.D.N.Y.) (court refused to order the editors of a medical newsletter to disclose their confidential sources, although those sources possessed information relevant to plaintiffs' allegations of adverse drug effects). But see *Carey* v. *Hume,* 494 F.2d 631 (D.C. Cir. 1974), *cert. dismissed,* 417 U.S. 938 (1974) (court ordered disclosure of a confidential source where the allegedly libelous statement was based *entirely* on confidential sources and the plaintiff had no way of proving falsity or reckless disregard without knowledge of the identity of those sources). See generally Comment, *Newsmen's Privilege Against Compulsory Disclosure of Sources in Civil Suits—Toward an Absolute Privilege?,* 45 U. Colo. L. Rev. 173 (1973).

editor's exercise of judgment in choosing whether or not to print newsworthy material. *Id.* at 257.

The Court in *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94 (1973) had, a year earlier, presaged the unqualified statement of *Tornillo*.[13] In holding that broadcasters were not required by the First Amendment to accept paid political advertisements, the Court observed: ". . . For better or worse, editing is what editors are for; and editing is selection and choice of material." Specifically, in addressing the issue of whether broadcaster's decisions constituted state action, Chief Justice Burger noted,

> . . . it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction. *Id.* at 120-1.

13 The Court's active consideration of the broadcast medium began, of course, with *Red Lion Broadcasting* v. *FCC*, 395 U.S. 367 (1969). There, the Supreme Court rejected the broadcaster's challenge, on conventional First Amendment grounds, to the fairness doctrine and to the FCC's "right of reply" rules. The rationale for the Court's holding is strikingly similar to that used in upholding the application of the antitrust laws to the press. Justice White observed,

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. *Id.* at 388-90.

It is clear from what we have said that newsgathering and dissemination can be subverted by indirect, as well as direct, restraints. It is equally manifest that the vitality of the editorial process can be sapped too if we are not vigilant. The unambiguous wisdom of *Tornillo* and *CBS* is that we must encourage, and protect against encroachment, full and candid discussion within the newsroom itself. In the light of these constitutional imperatives, the issue presented by this case is whether, and to what extent, inquiry into the editorial process, conducted during discovery in a *New York Times* v. *Sullivan* type libel action, impermissibly burdens the work of reporters and broadcasters.[14]

II

New York Times v. *Sullivan*, applying constitutional principles to the common law of libel, empowered a public figure to vindicate his reputation in an action if he could establish that the statements at issue were knowingly false, or made in reckless disregard of the truth. *New York Times* v. *Sullivan*, 376 U.S. at 279-80 (1964); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 162-5, 170-2 (1967); *Gertz* v. *Robert Welch*, 418 U.S. 323, 335 n. 6 (1974): *Goldwater* v. *Ginzburg*, 414 F. 2d 324 (2d Cir. 1969), *cert. denied*, 396

14 Appellants, in their brief, succinctly frame the issue before us:

> What effect should be given to the First Amendment protection of the press with respect to its exercise of editorial judgment in pretrial discovery in a libel case governed by *New York Times* v. *Sullivan*, 376 U.S. 254 (1964)?

On this appeal, appellants do not ask that we review the specific discovery rulings of the District Court. They seek only that we articulate a general principle delineating the First Amendment considerations applicable to discovery of editorial judgment under *Sullivan*. Brief for Appellants at 7-8.

U.S. 1049 (1970). Later decisions instructed that the *Sullivan* standard required a subjective inquiry into the defendant's state of mind. *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968).[15]

While *Sullivan* left a narrow area for public figures to maintain a libel action, limiting decisions have further refined *Sullivan* when viewed in the context of the First Amendment.[16] The opinions applying these additional constraints do so in recognition of the constitutional safeguards cloaking the press, and the need to protect editors and broadcasters. They speak with the same voice as do *CBS* and *Tornillo*.

For example, in *Buckley* v. *Littel*, 538 F. 2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977), we held that statements of opinion could not afford a basis for recovery in a libel case. The reason for this circumscription of libel was clear: the expression of personal opinions and views was fundamental to the need for vigorous debate. Indeed, it is part and parcel of the paramount function of the press —the dissemination of information. And, just last term, in *Edwards* v. *New York Times Co.*, 556 F. 2d 113 (2d Cir. 1977), we held that a newspaper could not libel an individual when the reporter engaged in the neutral reportage of newsworthy material. Our concern there, too, was that the press be unhampered in bringing news to the public.[17]

15 Appellees concede that the instant libel action is governed by *Sullivan*. Brief for appellee at 16. Hence, the question which the Supreme Court has recently found so troublesome, the characterization of 'public figure' in libel suits, is not before us. See *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971) (*Sullivan* standard extended to private individual involved in event of public or general interest); but see *Gertz* v. *Robert Welch*, 418 U.S. 323 (1974) (Chicago attorney engaged in prominent trial not deemed to be a public figure).

16 *Sullivan* has been further refined, substantively and procedurally. For example, where it is unlikely that the plaintiff will succeed on the merits of his claim, courts have been more willing, within the area of libel than elsewhere, to grant summary judgment. See, e.g., *Guitar* v. *Westinghouse Electric Corp.*, 396 F. Supp. 1042, 1053 fn.16 (S.D.N.Y.), and cases cited therein.

These reciprocal developments in the law of libel and in freedom of the press narrowly define our task: we must permit only those procedures in libel actions which least conflict with the principle that debate on public issues should be robust and uninhibited. If we were to allow selective disclosure of how a journalist formulated his judgments on what to print or not to print, we would be condoning judicial review of the editor's thought processes. Such an inquiry, which on its face would be virtually boundless, endangers a constitutionally protected realm, and unquestionably puts a freeze on the free interchange of ideas within the newsroom. A reporter or editor, aware that his thoughts might have to be justified in a court of law, would often be discouraged and dissuaded from the creative verbal testing, probing, and discussion of hypotheses and alternatives which are the *sine qua non* of responsible journalism. Indeed, the *ratic decidendi* for *Sullivan's* restraints on libel suits is the concern that the exercise of editorial judgment would be chilled.

III.

With these principles set forth, we proceed to traverse the facts before us in some detail. In March 1971, Colonel

17 In *Edwards*, we stated,

> We believe that the int[illegible] a public figure in the purity of his reputation cannot be al[illegible] obstruct that vital pulse of ideas and intelligence on which an informed and self-governing people depend. It is unfortunate that the exercise of liberties so precious as freedom of speech and of the press may sometimes do harm that the state is powerless to recompe[illegible]ut this is the price that must be paid for the blessings of a [illegible]ic way of life. *Id.* at 122.

Anthony Herbert achieved national importance when he formally charged his superior officers, Brigadier General John W. Barnes and Colonel J. Ross Franklin, with covering up war crimes in Vietnam. Herbert claimed, in documents filed with the U.S. Army Criminal Investigation Division (CID), that he had witnessed numerous atrocities while commanding a battalion of the 173rd Airborne Brigade. The most horrifying involved the murder of four prisoners of war by South Vietnamese police in the presence of an American advisor, who callously failed to intervene. Since those killings allegedly occurred on February 14, 1969, Herbert dubbed them the "St. Valentine's Day Massacre."

Herbert claimed to have reported all atrocities immediately to Colonel Franklin, deputy commander of the 173rd Airborne, at Brigade Headquarters in Vietnam, and to have brought several to the attention of the Brigade's commander, General Barnes. But, Herbert alleged, neither was interested in investigating the incidents. When Herbert persisted in pressing his charges, he said that he was abruptly relieved of his command, a determination that was subsequently affirmed by a military appeals tribunal. His removal as battalion commander was attributed to a poor efficiency report authored by Colonel Franklin, which accused Herbert of having "no ambition, integrity, loyalty or will for self-improvement."

Herbert's sudden fall from grace surprised many observers. His long career in the military had been exemplary; under his strong leadership, the second battalion had exhibited extraordinary prowess in battle. His military acumen had earned Herbert one Silver and three Bronze stars, and he had recently been recommended to receive the Distinguished Service Cross.

Herbert's story fascinated an American public that was increasingly becoming disenchanted with the Vietnam War. In July 1971, he was interviewed by Life Magazine; that September, James Wooten of the New York Times wrote an article favorable to Herbert titled "How a Supersoldier Was Fired From His Command." Interviews with the television personality Dick Cavett followed which, according to Cavett, elicited a level of viewer response unmatched by any other single program. In October 1971, Congress became embroiled in the 'Herbert affair' when Rep. F. Edward Hebert, Chairman of the Armed Services Committee, convinced the Army to remove Herbert's poor efficiency report from his military record.

The Army also thoroughly investigated Herbert's charges of war crimes and, in October 1971, exonerated General Barnes. Armed with this new information, reporters began for the first time to critically examine the veracity of Herbert's story. During this period of intense public interest, Herbert announced his retirement from the service. He cited, as the reason for his decision, incessant harassment by the military because of his disclosures.

Barry Lando, an associated producer of the CBS Weekend News, was one of the many individuals interested in the Herbert story. He interviewed Herbert in June 1971 and later produced a laudatory report which was televised on July 4, 1971 over the CBS network. A year later, Lando had become a producer for CBS's documentary news program, "60 Minutes." He decided to investigate both Herbert's military career and his charges of cover-up for a comprehensive broadcast on the ensuing controversy. Lando interviewed not only Herbert, Franklin and Barnes, but questioned others, both in and out of the military, who could corroborate Herbert's claims that he had reported

war crimes, and that the military had engaged in a systematic whitewash. Indeed, some of the leads which Lando pursued may have been supplied by Herbert himself during their repeated and extensive conversations. Lando focused on particular allegations. He spent some time in attempting to assay whether Herbert had, in fact, reported the St. Valentine's Day Massacre to Franklin in Vietnam on February 14, 1969. Since Franklin protested that he was returning from Hawaii on that date, Lando concentrated on this point. Lando obtained Franklin's hotel bill and a cancelled check in payment of that bill, and interviewed others who could verify Franklin's activities on the crucial days. Lando also questioned Captain Bill Hill, upon whom Herbert relied to substantiate his story. When Hill recalled that Herbert reported war crimes to someone, he could not say with total certainty that Franklin was the individual.

Other allegations were also considered. Lando investigated Herbert's activities during the eighteen-month period between his relief from command and the filing of formal war crimes charges to determine whether Herbert had apprised other officers in Vietnam of his accusations. In particular, Lando interviewed the highest ranking military lawyer and judge in Vietnam at the time, Colonel John Douglass, who emphatically controverted Herbert's assertion that war crimes had been brought to his attention. Lando also elicited from Kenneth Rosenbloom, the military attorney and investigator who conducted the Army's inquiry into Herbert's allegations, the view that the military's handling of the charges was beyond reproach.

Lando also questioned soldiers who had served under Herbert to determine his qualities as commander. One of these, Sergeant Bruce Potter, reported occasions upon

which Herbert had countenanced the commission of war crimes. Potter recounted, for example, an incident in which Herbert had thrown a sand bag out of a helicopter to frighten a war prisoner on the ground into thinking it was a fellow prisoner who had been ejected.

During this period, Lando received an uncorrected proof of "Soldier," a book written by Herbert in collaboration with James Wooten of the New York Times. Although several of those interviewed by Lando attested to the verity of many of Herbert's reports, others did not. Thus, Herbert wrote that Captain James Grimshaw had once attempted to drive certain Viet Cong soldiers from a cave without injuring female civilians and children by valiantly entering their hiding place alone. Grimshaw, however, denied the incident had occurred.

Lando's research culminated in the telecast of "The Selling of Colonel Herbert" on February 4, 1973. That evening, the American people were presented with a fallen hero. The presentation on the air initially juxtaposed Herbert's claims and the denials of Franklin and Barnes that Herbert ever reported war crimes, and then considered in detail five aspects of the Herbert affair:

(1) Lando's doubts that Franklin was even present in Vietnam to hear of the St. Valentine's Day Massacre;

(2) Colonel Douglass's adamant denial that war crimes had been reported to him;

(3) Kenneth Rosenbloom's defense of the Army's investigation;

(4) Bruce Potter's recount of the helicopter incident; and

(5) James Grimshaw's flat contradiction of his alleged heroism in the cave.

While the existence of information corroborative of Herbert's claims was alluded to on the broadcast, the program as a whole clearly cast doubt upon all of Herbert's allegations. The telecast concluded with a plea that the Army make its records public to the end of conclusively settling the imbroglio.

Lando subsequently recounted his research in an Atlantic Monthly article titled "The Herbert Affair." The article, like the broadcast, cast serious doubts upon Herbert's veracity and concluded that the American press had been deluded by Herbert's story.

Herbert responded to the CBS broadcast and Lando's article by instituting a defamation action against CBS, Barry Lando, Mike Wallace, the correspondent for the program, and Atlantic magazine, alleging $44,725,000 in damages for injury to his reputation and impairment of his book 'Soldier' as a literary property. Herbert contended that Lando deliberately distorted the record through selective investigation, "skillful" editing, and one-sided interviewing, and that he was deliberately depicted as evasive in the interview. In addition, Herbert claimed Atlantic republished Lando's statements knowing that they were false. Lando, Wallace and CBS countered that the publications represented a fair and accurate report of public proceedings, broadcast in good faith without malice, and, in addition, that the program and article were protected by the First and Fourteenth Amendments.

Once the issue was joined, Herbert commenced discovery of Lando, Wallace and CBS. The deposition of Lando required twenty-six sessions and lasted for over a year. The

sheer volume of the transcript—2903 pages and 240 exhibits—is staggering. Lando answered innumerable questions about what he knew, or had seen; whom he interviewed; intimate details of his discussions with interviewees; and the form and frequency of his communications with sources.[18] The exhibits produced included transcripts of his interviews; volumes of reporters notes; videotapes of interviews; and a series of drafts of the "60 Minutes" telecast. Herbert also discovered the contents of pre-telecast conversations between Lando and Wallace as well as reactions to documents considered by both. In fact, our close examination of the twenty-six volumes of Lando's testimony reveals a degree of helpfulness and cooperation between the parties and counsel that is to be commended in a day when procedural skirmishing is the norm. Lando, however, balked when asked a small number of questions relating to his beliefs, opinions, intent and conclusions in preparing the program.[19] He claimed that any response would be inconsistent with the protections afforded the editorial process by the First Amendment. These assertedly objectionable inquiries can be grouped into five categories:

1. Lando's conclusions during his research and investigations regarding people or leads to be pursued, or

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18 Much of Lando's testimony concerned the volumes of his notes which were produced. Lando painstakingly deciphered and explained the short, and often cryptic, remarks taken down during interviews. Lando's explanations frequently led to lengthy discussions regarding the subject matter of his discussions with third persons.

19 Here, too, counsel exhibited a remarkable degree of cooperation. In advance of Herbert's Rule 37 motion to compel discovery, Judge Haight suggested that the parties might voluntarily reach agreement concerning many of the objectionable questions. A substantial number of questions were withdrawn as a result, as were objections to a large number of others.

not to be pursued, in connection with the '60 Minutes' segment and the Atlantic Monthly article;

2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;
3. The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events;
4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and
5. Lando's intentions as manifested by his decision to include or exclude certain material.

Faced with Lando's claim that the constitution immunized his mental process from discovery, Herbert sought an order, pursuant to Rule 37(a)(2) of the Federal Rules of Civil Procedure, compelling Lando to respond to his inquiries.[20] Judge Haight, after observing that the case

20 Rule 37(a) provides that

> A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery . . .

A motion under Rule 37(a) implements the provisions of Rule 26(b)(1):

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Further, Rule 26(c) protects the party against whom discovery is sought by empowering the district court to issue a protective order to:

> protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . .

In compelling discovery, Judge Haight applied these rules but did not consider whether inquiry into editorial process would be oppressive or unduly burdensome.

was one of first impression, concluded that Herbert's discovery of the journalist's state of mind should be broad and unrestricted. He reasoned that a public figure bore a heavy burden of proving that an alleged libeler acted with actual malice or in reckless disregard of the truth, and that the necessarily subjective nature of the libel standard fully justified inquiry into Lando's thought processes.

Judge Haight dismissed Lando's contention that the machinations of the editorial mind were constitutionally sacrosanct and immune from the probing of a libel plaintiff.[21] The critical importance of the issue, whether the First Amendment erects any barriers to discovery of the editorial process, compelled this court to permit the instant interlocutory appeal, pursuant to 28 U.S.C. §1292(b), of the district court's order that Lando answer Herbert's inquiries.

IV.

We have undertaken this extensive review of the facts to underscore that the lifeblood of the editorial process is human judgment. The journalist must constantly probe and investigate; he must formulate his views and, at every step, question his conclusions, tentative or otherwise. This is the process in which Barry Lando was engaged and his

21 Judge Haight concluded that *Sullivan* had already struck the balance between First Amendment rights and the protection of reputation. He argued that, since *Sullivan* allowed for a libel recovery upon a showing of actual malice or reckless disregard, all discovery leading to admissible evidence was proper. He dismissed out of hand appellants' contention that *Tornillo* and *CBS* mandated additional First Amendment protections:

> I find no substance in the argument defendants based upon the "editorial judgment" concept. . . . These cases *(CBS, Tornillo, Bransburg)* have nothing to do with the proper boundaries of pretrial discovery in a defamation suit alleging malicious prosecution.

efforts suggest the nature and scope of the reporter's task in shaping and refining a mass of facts into a finished product.[22]

Herbert seeks to scrutinize this very process. Of course, he has already discovered what Lando knew, saw, said and wrote during his investigation. As we noted before, the deposition of Lando produced a massive transcript documenting in minute detail the course of Lando's research. The jury is free to infer from Lando's use and application of the extensive materials discovered and, equally important, from the failure to heed certain contradictory information. If it chooses to do so (and as we have indicated in footnote 22, we express no views on the merits of the controversy), it can find that Lando acted with actual malice or in reckless disregard of the truth.

Now, Herbert wishes to probe further and inquire into Lando's thoughts, opinions and conclusions. The answers he seeks strike to the heart of the vital human component of the editorial process. Faced with the possibility of such an inquisition, reporters and journalists would be reluctant to express their doubts. Indeed, they would be chilled in the very process of thought. As we expressed above, the tendency would be to follow the safe course of avoiding contention and controversy—the antithesis of the values fostered by the First Amendment.

We cannot permit inquiry into Lando's thoughts, opinions and conclusions to consume the very values which the *Sullivan* landmark decision sought to safeguard.[23] It

22 In so characterizing Lando's research, we do not mean to express any view as to the merits of the controversy.

23 Selective inquiry into the reporter's thoughts can be far worse than the discovery of all aspects of his mental process. In plumbing only particular facets of the reporter's mind, the libel plaintiff is more likely to distort the nature of the editorial process.

cannot be gainsaid that were a legislative body to require a journalist to justify his decisions in this matter, such an intrusion would not be condoned. That this invasion on First Amendment rights is about to be effected by an allegedly libelled plaintiff does not reduce the grave implications for the vitality of the editorial process which the Supreme Court and this court have recognized must be guarded zealously. It makes little sense to afford protection with one hand and take it away with the other. Accordingly, we remand to the district court for an evaluation of the interrogatories in light of the principles articulated in this opinion.

OAKES, *Circuit Judge* (concurring):

I concur with much of Chief Judge Kaufman's opinion, his broad answer to the certified question and the overall judgment. Because this case breaks new ground in an area of utmost importance, it warrants setting forth the somewhat different First Amendment analysis I use to reach the ultimate result, even at the risk of some repetition. In the process I will also set forth my own slightly more detailed views on the approach that should be taken by the district court on remand, for whatever guidance they may supply.

I

As we know, in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), the Supreme Court "constitutionalized" the law of defamation by subjecting it to requirements deriving from and implicit in the First Amendment.[1] In

1 *See Restatement (Second) of Torts*, Special Note at 3 (Tent. Draft No. 21, 1975); Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 Va. L.

cases involving publication of matter pertaining to public affairs and involving public officials—as this case does[2]—to be liable a defendant must have acted with "actual malice"[3] as constitutionally defined. *Sullivan* contemplates not only that the alleged defamatory statements are false but that the libel defendant knew that they were false or made them with reckless disregard of their truth or falsity. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *New York Times Co.* v. *Sullivan, supra*, 376 U.S. at 279-80. The appropriate standard is whether "the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). In this respect, ill will toward the plaintiff, bad motive, hatred, spite or even desire to injure—malice in the traditional as opposed to the constitutional sense—is not involved. *See Old Dominion Branch No. 496, National Association of Letter Carriers* v. *Austin*, 418 U.S. 264, 281

Rev. 1349, 1364-1408 (1975); Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 Tex. L. Rev. 199, 199 (1976). For an early explication of the change of the tort law of defamation into a subject of constitutional dimension, see Kalven, *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191.

2 It involves the conduct of the Vietnam war, a public issue, *New York Times Co.* v. *United States*, 403 U.S. 713, 724 (1971) (Douglas, *J.*, concurring), and a United States Army officer who was a public official and employee, who by his charges against the military establishment unquestionably made himself a public figure, thereby inviting "attention and comments." *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); *Buckley* v. *Littell*, 539 F.2d 882, 885-86 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

3 The phrase "actual malice" is a "term of art" that evidently is now "studiously avoided" by the Supreme Court. *See* Eaton, *supra* note 1, at 1370 n.87. However, it is a shorthand phrase for *Sullivan*'s "knowing falsity or reckless disregard of truth" test. It is used here in its accurate sense.

(1974); *Buckley* v. *Littell*, 539 F.2d 882, 889 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

This case presents the broad question whether in a case involving allegations of actual malice discovery should be "liberal" as provided generally by the Federal Rules of Civil Procedure[4] and as held by the trial judge, or should be restricted in certain ways. The restriction urged on us specifically is that matters of "editorial process" [5] should not be discoverable at all or only under certain limitations. The exact relief requested remains somewhat unclear since appellant's brief would have us remand to the district court "with instructions for that Court to redetermine the issues raised by the motions [pursuant to Rule 37 of the Federal Rules of Civil Procedure], giving due regard to First Amendment considerations as set forth by this Court." Brief for Appellant at 8, 32-33. Within these broad parameters we are invited in this extraordinary though not unique interlocutory appeal on a discovery order,[6] to set some limits in *Sullivan* cases on the untrammeled, roving discovery that has become so prevalent in other types of litigation in today's legal world. Not

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4 Fed. R. Civ. P. 26(b)(1).

5 While the area for which appellant seeks protection, "editorial process," may initially seem vague, guidance is provided by Chief Justice Burger's statements in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974), and in *Columbia Broadcasting Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 124-25 (1973). *See* text accompanying note 37 *infra*. The specific areas of inquiry sought by the plaintiff are set out in Chief Judge Kaufman's opinion, *ante* at 238-39.

6 *See Socialist Workers Party* v. *Attorney General*, No. 77-3041, slip op. at 6627 (2d Cir. Oct. 11, 1977) (no interlocutory review of discovery order absent certification, "manifest abuse of discretion," or legal question of "extraordinary significance"); *cf. Time, Inc.* v. *McLaney*, 406 F.2d 565, 566 (5th Cir.) (interlocutory review of a denial of summary judgment appealable because of critically important First Amendment issue), *cert. denied*, 395 U.S. 922 (1969).

without the doubt that any venture on untrod paths may bring, I am willing to join in accepting the invitation.

At the outset, there are familiar landmarks. There is, for example, no necessary internal inconsistency between a First Amendment limitation on compelled discovery in *Sullivan* cases on the one hand and liberal rules of civil procedure on the other.[7] The rules of civil procedure expressly contemplate limitations in at least two areas. First, where discovery would result in "oppression" of or "undue burden" on a person whose deposition is being taken, a court may limit or even forbid discovery.[8] Certainly, therefore, a plaintiff's attempt to prove actual malice may be restrained where the discovery he seeks satisfies the oppression standard of Rule 26(c). And second, Rule 26(b)(1) excepts privileged matters from compelled discovery.[9] Not surprisingly, a privilege insulating journalists' confidential sources from compelled discovery in civil litigation has been recognized by this court and others. *Baker* v. *F & F Investment*, 470 F.2d 778 (2d Cir. 1972) (civil rights litigation), *cert. denied*, 411 U.S. 966 (1973); *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972) (public figure libel litigation), *cert. denied*, 409 U.S. 1125 (1973); *see Apicella* v. *McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975); *Loadholtz* v. *Fields*, 389 F. Supp. 1299 (M.D. Fla. 1975). *But see Dow Jones & Co.* v. *Superior Court*, 303 N.E.2d 847 (Mass. 1973). The limitation on discovery of journalists' sources suggests by analogy that other First Amendment limitations on discovery in

7 I do not mean to suggest that Judge Haight in his scholarly opinion below relied simply on the discovery rules.

8 Fed. R. Civ. P. 26(c); *cf. Branzburg* v. *Hayes*, 408 U.S. 665, 707-08 (1972) (grand jury harassment of press impermissible).

9 Fed. R. Civ. P. 26(b)(1).

Sullivan cases may be similarly appropriate. The focus of inquiry thus becomes whether the First Amendment protects matters which constitute the editorial process from compelled discovery and, if so, the extent of that protection.

II

I agree with the Chief Judge that compelled discovery of the editorial selection process implicates the First Amendment. I arrive at this position not on First Amendment grounds generally but in light of what seems to be the Supreme Court's evolving recognition of the special status of the press[10] in our governmental system and the concomitant special recognition of the Free Press clause of the First Amendment. Mr. Justice Stewart, in a seminal speech at the Yale Law School, has characterized this trend as a structural, institutional differentiation between freedom of speech and freedom of press.[11] The trend has found expression that is both developmental and fundamental in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). There the Court established an area of protection of the *press* against "intrusion into the function of editors." *Id.* at 258. The Court held unconstitutional a Florida statute requiring newspapers to print the replies of political candidates who had been editorially attacked. Chief Justice Burger's opinion for a unanimous Court explained that "governmental regulation" of the "crucial process" of "editorial control and judgment" can-

10 That the broadcast media are "press" is reasonably well established. *E.g., Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 496-97 (1975); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 394 (1969); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

11 Stewart, *"Or of the Press,"* 26 Hastings L.J. 631, 633 (1975); *see* text accompanying notes 16-17 *infra*.

not be exercised consistently with evolving First Amendment guarantees of a free press. *Id.*[12] *Tornillo* expressly

12 Concurring, Mr. Justice White noted:

> Regardless of how beneficient-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.

Miami Herald Publishing Co. v. *Tornillo, supra,* 418 U.S. at 259 (White, *J.*, concurring) (footnote omitted). *But see Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 385-86, holding that political editorializing by radio broadcasters is subject to the "fairness doctrine" under the Federal Communications Act. As to the right of access guaranteed by *Red Lion*, see F. Friendly, *The Good Guys, The Bad Guys and the First Amendment: Free Speech vs. Fairness in Broadcasting* (1976). *Compare* B. Schmidt, *Freedom of the Press vs. Public Access* (1976), *with* Abrams, *In Defense of* Tornillo, 86 Yale L.J. 361 (1976) (book review).

The *Red Lion* opinion, as well as the Act of Congress on which it is based, have been increasingly criticized for failing to consider the institutional aspects of the press. *E.g.*, Note, *Press Protections for Broadcasters: The Radio Format Change Cases Revisited,* 52 N.Y.U.L. Rev. 324, 339 (1977) [hereinafter Note, *Press Protections*]. The criticism suggests that the opinion and Act fail to take into account the distinction between the Speech and Press clauses. As Chief Judge Bazelon has noted:

> If one group has a right of access or a right to have the licensee present that group's point of view, there is no independent press; there is only a multitude of speakers. That might be permissible if the First Amendment protected only free speech. However, it also protects the press.

Bazelon, *FCC Regulation of the Telecommunications Press,* 1975 Duke L.J. 213, 235 (footnote omitted); *see* Note, *Press Protections, supra* at 339 n.102.

It has been asserted that historically there was no differentiation between Speech and Press guarantees. L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 173-74 (1960); Lange, *The Speech and Press Clauses,* 23 U.C.L.A. L. Rev. 77, 88-99 (1975); Note, *Press Protections, supra* at 342. But the High Court arguably has established the differentiation by now whether or not it was the "original position." *Compare* Stewart, *supra* note 11, at 631-37, and Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?,* 26 Hastings L.J. 639, 645-50 (1975), *with* Lange, *supra* at 77 *passim.*

adopted some of the premises and many of the implications of *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973). *Columbia Broadcasting* had emphasized the First Amendment right of broadcasters to make independent editorial programming decisions. In holding that neither the Communications Act nor the First Amendment requires broadcasters to accept paid editorial advertisements, Chief Justice Burger stated:

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but . . . [c]alculated risks of abuse are taken in order to preserve higher values.

Id. at 124-25.

Governmental regulation surely includes judicial as well as legislative regulation; the First Amendment binds the courts just as it binds the other branches of government.[13] *Tornillo* and *Columbia Broadcasting* thus suggest and support, if they do not compel, the proposition that the First Amendment will not tolerate intrusion into the decision-making function of editors,[14] be it legislative or judicial action.

13 *Sullivan* itself recognizes limitations on the courts imposed by the First Amendment. So, too, does *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539 (1976) (judicially imposed gag order violates First Amendment rights of the press).

14 *See Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 391 (1973). There the Court, in upholding the constitutional validity of an ordinance prohibiting sex-based help-wanted advertisements, emphasized:

> [N]othing in our holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements

The district court declined to apply the editorial process concept simply on the basis that *Tornillo* and *Columbia Broadcasting* had "nothing to do" with the proper boundaries of discovery in a libel case. *Herbert* v. *Lando,* 73 F.R.D. 387, 396 (1977). While this notion may be appealing initially, the principle enunciated in these cases—that the editorial process of the *press* is entitled to special protection—has, I think, not just pertinent, but altogether controlling ramifications.[15] As Mr. Justice Stewart has pointed out, "the Free Press guarantee is, in essence, a *structural* provision of the Constitution." [16] He continues:

> Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.

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commenting on the Ordinance, the enforcement practices of the Commission, or the propriety of sex preference in employment. Nor, *a fortiori*, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial.

15 Government intrusion into ediorial functions may result from compelled disclosure of editorial conclusions, opinions and intentions. To be sure, *Tornillo* and *Columbia Broadcasting* do not specifically deal with First Amendment limitations on discovery. But they give concrete form to the structural concept of press freedom in the editorial selection process which would otherwise be subjected to stress, if not internally weakened to the point of nonrepair, by the probing drill of unrestrained discovery.

16 Stewart, *supra* note 11, at 633-34.

> This basic understanding is essential, I think, to avoid an elementary error of constitutional law. It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are* guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy . . . .
>
> It is also a mistake to suppose that the only purpose of the constitutional guarantee of a free press is to insure that a newspaper will serve as a neutral forum for debate, a "marketplace for ideas," a kind of Hyde Park corner for the community. A related theory sees the press as a neutral conduit of information between the people and their elected leaders. These theories, in my view, again give insufficient weight to the institutional autonomy of the press that it was the purpose of the Constitution to guarantee . . . .
>
> The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches.

Stewart, *"Or of the Press,"* 26 Hastings L.J. 631, 633-34 (1975) (emphasis in original).

The structural or institutional aspect of the Free Press guarantee is not, as Justice Stewart points out, some filigree added at the final stages of design by the architects of the Constitution. Rather it is at the core of the construct, vital to the tensile integrity of our government. *See New York Times Co.* v. *United States,* 403 U.S. 713, 717 (1971) (Black, *J.*, concurring); *United States* v. *National*

Committee for Impeachment, 469 F.2d 1135, 1142 (2d Cir. 1972). To the extent that the independent exercise of editorial functions is threatened by governmental action, the very foundations of the architectural masterpiece that is our form of government are shaken, the supporting columns weakened.[17]

Tornillo and *Columbia Broadcasting* recognize the inviolability of the editorial function. As such they reflect a keen judicial recognition of the role of the press in American society and its need for protection, a trend that has been evidenced by practically solid judicial response in favor of protection.

The doctrine of prior restraint, prohibiting government from censoring publications in advance, is of the highest constitutional magnitude.[18] This presumption[19] against the

17 *But see Carey* v. *Hume*, 492 F.2d 631, 639-40 (D.C. Cir. 1974) (MacKinnon, *J.*, concurring) (immense power of modern media requires that reporter divulge sources in civil libel suit), *cert. dismissed*, 417 U.S. 938 (1974). The power that Judge MacKinnon (and the advocates of the Florida access statute in *Tornillo*) fears may, however, be dealt with in other ways. The FCC has, for example, won court approval to bar newspaper ownership of broadcast/television media in a single locale in the future. *See National Citizens Comm. for Broadcasting* v. *FCC*, 555 F.2d 938 (D.C. Cir. 1977), *cert. granted*, 46 U.S.L.W. 3179-80 (U.S. Oct. 4, 1977) (Nos. 76-1471, 76-1521, 76-1595, 76-1604, 76-1624, 76-1685).

18 Prior restraints have generally been condemned as the most egregious violations of press freedom. *E.g.*, *Nebraska Press Ass'n* v. *Stuart*, *supra*, 427 U.S. at 559 ("A prior restraint . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time.") (footnote omitted); *see Times Film Corp.* v. *City of Chicago*, 365 U.S. 43, 53 (1961) (Warren, *C.J.*, dissenting). The precise parameters of the prior restraint doctrine have never been delineated. *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931), expanded the classic English definition of prohibiting publication without advance approval of the government to preclude an injunction against publication of malicious and scandalous matter enforced by a

Footnote 19 appears on p. 33a

constitutional validity of prior restraints is particularly strong when the intrusion affects the communication of news or commentary on current events. *See Nebraska*

subsequent contempt order. The later threat of an injunction was viewed as a prior restraint; while the metaphor of "chilling effect" had not yet been devised it was already operational. The broad scope of the doctrine is apparent from the holding in *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936), where a tax imposed on newspapers publishing advertisements and measured by the amount of circulation was found to be an unconstitutional prior restraint because the tax lowered advertising revenues and restricted circulation. *Id.* at 244-45. Justice Sutherland explained the scope of the prior restraint doctrine as enunciated in *Near:*

> The conclusion there stated is that the object of the constitutional provisions was to prevent previous restraints on publication; and the court was careful not to limit the protection of the right to any particular way of abridging it . . . .
>
> Judge Cooley has laid down the test to be applied—"The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 2 Cooley's Constitutional Limitations, 8th ed., p. 886.

Id. at 249-50.

The broad discovery order in this case operates *after* publication to deter free editorial choice concerning *subsequent* publications. Because the order operates as a prior restraint, as did the tax in *Grosjean*, it should be presumed invalid. *See* T. Emerson, *The System of Freedom of Expression* 503-12 (1970). Furthermore, the order impinges on the most sensitive functions of the press, the motivations behind and thought processes involved in editorial decisions; thus, the presumption should be given all the more force. The prior restraint cases, as well as *Tornillo* and *Columbia Broadcasting*, appear to be directed against the danger of self-censorship by the press arising from concern with subsequent executive, legislative or judicial scrutiny. It is the protection these cases afford that truly gives rise to the concept of the press as a Fourth Estate, coequal in our democratic republic in constitutional respect, even though not incorporated formally into our governmental system as a structuralized entity.

19 *New York Times Co.* v. *United States*, *supra*, 403 U.S. at 714; *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963).

Press Association v. *Stuart*, 427 U.S. 539, 559 (1976); *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 717 (1931).

Further solidifying judicial recognition of the compelling institutional need for an independent press, again in a test that has been nothing less than momentous, is the decision that notwithstanding the Sixth Amendment guarantee to a fair trial by an impartial jury, judicial restraints on the publication of information concerning criminal trials will be tolerated only when less drastic methods of avoiding the effects of pretrial publicity are useless.[20] *Nebraska Press Association* v. *Stuart, supra*, 427 U.S. at 562. The Freedom of Press guarantee against governmental intrusions on the editorial process is surely at least as strong when, as here, other constitutional rights are not at stake.

20 Another example of increasing judicial recognition of the fundamentality of the Press guarantee is the newly perceived status of commercial speech. *See Bates* v. *State Bar of Ariz.*, 45 U.S.L.W. 4895 (U.S. June 27, 1977); *Linmark Assocs., Inc.* v. *Township of Willingboro*, 45 U.S.L.W. 4441 (U.S. May 2, 1977); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). The *Sullivan* doctrine itself, subjecting the common law of libel to First Amendment limitations, while addressed to expression generally, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964), also reflects a pervasive Supreme awareness of the arterial flow to our system of democracy given through the channels of a free press. The *Sullivan* doctrine was, after all, enunciated in a suit against a newspaper. The opinion of the Court drew extensively on the history of the discredited Alien and Sedition Acts, *id.* at 273-77, emphasizing Madison's Report to the effect that "the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law." *Id.* at 275 (quoting 4 Elliot's Debates on the Federal Constitution 570 (1876)). Mr. Justice Goldberg, concurring, advocated unconditional First Amendment protection to criticize official conduct. *Id.* at 298. He, too, relied heavily on the need for robust debate to ensure a stable, responsive democratic government. *See id.* at 300. *See generally* 1 N. Dorsen, P. Bender & B. Neuborne, *Emerson, Haber & Dorsen's Political and Civil Rights in the United States* 20-51 (4th ed. 1976) [hereinafter 1 N. Dorsen], for an historical analysis of the First Amendment.

In short, the principles underlying the access and prior restraint cases apply in this situation even though the government is neither ordering the content of a publication nor directly restraining publication. The critical question is whether government is impermissibly impeding the editorial function of the press; the time[21] at which this intrusion occurs should not—it cannot—matter.[22] Because broad discovery orders compelling disclosure of the editorial selection process can result in a chilling of "the free interchange of ideas within the news room," *ante* at 232, the "crucial process" of "editorial control and judgment" protected by the Freedom of Press clause, *Miami Herald Publishing Co.* v. *Tornillo, supra*, 418 U.S. at 258, is in as much jeopardy as if the court had restrained publication *ab initio*. For self-censorship in the future resulting from the prior judicial order is a foreseeable, perhaps a likely, result. "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate

21 The phrase "prior restraint" obviously no longer connotes a strict temporal meaning. Supreme Court cases indicate, *see* note 18 *supra*, that meddling with press freedoms after the printing or programming has occurred operates as a "prior restraint" on future editorial decisions by virtue if the chilling effect created by that interference. *See* T. Emerson, *supra* note 18, at 511.

22 It has often been acknowledged that trivial distinctions between types of governmental intrusion will not be relied upon when the effects impinge the Free Press guarantee.

In rejecting the argument that there is a meaningful difference between government restricting the content of press communications and compelling the press to publish what "reason tells them should not be published," the Court in *Tornillo* noted that "[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." 418 U.S. at 256. *See Baker* v. *F & F Investment*, 470 F.2d 778, 785 (2d Cir. 1972) (Kaufman *J.*), *cert. denied*, 411 U.S. 966 (1973).

determination that it is unprotected by the First Amendment." *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376, 390 (1973). This is a concern directed at the "institutional viability" of the press. *Id.* at 382. Uninhibited discovery into the motivations of the editor in a libel action poses precisely the danger sought to be avoided by the landmark cases which have established the prior restraint doctrine as hornbook constitutional law. Accordingly, the principles underlying the doctrine necessitate the application of the Free Press guarantee to protect the independence of the press against such discovery.

This is by no means the first instance in which First Amendment considerations have dictated special procedural rules.[23] It is not even the first situation in which a court has held that the First Amendment extends protection in a libel case beyond the standards for liability established in *Sullivan* in order to prevent undue chilling from the litigation process itself.[24]

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23 *See, e.g., Broadrick* v. *Oklahoma,* 413 U.S. 601, 611-14 (1973) (relaxed standing rules to challenge statutes allegedly violative of the First Amendment); *Baker* v. *F & F Investment, supra,* 470 F.2d at 783 (rejecting disclosure of journalists' sources in civil rights case except under limited circumstances).

24 Indeed, in *Sullivan* the Court qualified those standards by the self-imposed procedural limitation that it would make an independent examination of the entire record. *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 285 & n.26; *see Time, Inc.* v. *Pape,* 401 U.S. 279, 284 (1971); *Buckley* v. *Littell, supra,* 539 F.2d at 888. A number of courts taking a normally cautious attitude toward summary judgment have been somewhat more relaxed in constitutional libel cases. *Washington Post Co.* v. *Keogh,* 365 F.2d 965, 967-68 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967); *see* 1 N. Dorsen, *supra* note 21, at 693-95. To prevail, moreover, again as established by *Sullivan* itself, a plaintiff's evidence must be of "convincing clarity," rather than a mere preponderance. *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 285-86; *see Wasserman* v. *Time, Inc.,* 424 F.2d 920, 922 (D.C. Cir.) (Wright, *J.*, concurring), *cert. denied,* 398 U.S. 940 (1970); Freund, *William J. Brennan, Jr.,* 86 Yale L.J. 1015, 1016 (1977). First Amendment considerations have been held to lead more readily to a finding of *forum non conveniens, Buckley* v. *New York Post Corp.,* 373 F.2d 175, 183-84 (2d Cir. 1967), and lack of jurisdiction, *New York Times Co.* v. *Connor,* 365 F.2d 567, 570-73 (5th Cir. 1966).

By recognizing that *Tornillo* and *Columbia Broadcasting* require a constriction of the normal discovery rules to protect the editorial selection process of the press from compelled scrutiny, we simply add an additional procedural rule in the interest of ensuring an independent, institutional freedom of the press.[25] Only the level of protection remains to be determined.[26]

III

In selecting the appropriate level of protection for the editorial process, we are faced with three theoretical pos-

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25 To the extent that this conclusion creates an inconsistency between judicial treatment of the press on the one hand and non-press defendants on the other, the inconsistency may be said to rest upon the non-redundant nature of the Freedom of Press guarantee. *See* note 12 *supra. But see Restatement (Second) of Torts* § 580B, Comment d at 29-30 (Tent. Draft No. 21, 1975), discussing the scope of *Gertz* v. *Robert Welch, Inc., supra:*

> The defendant in the *Gertz* case was the publisher of a magazine. The Court speaks frequently of "news media" and "communications media" and states the rule in terms of a "publisher or broadcaster." The precise holding of the case therfore, [sic] does not extend beyond a statement published by a member of the communications media; and the constitutional requirement of fault on the part of the defendant may turn out to be limited to this holding, though this seems unlikely.

Of course, there would be no inconsistency if the *Sullivan* rule were abandoned in favor of non-liability to public figure plaintiffs.

26 From its inception the *Sullivan* rule, as a matter of substantive law, has not been spared of criticism. Justices Black, Douglas and Goldberg thought the actual malice test constitutionally deficient for inquiring in the first place into the editor's state of mind. As Mr. Justice Black explained:

sibilities. First, we might conclude as did the lower court that *Sullivan* has struck the ultimate appropriate balance so that the libel plaintiff must be permitted a level of discovery coterminous with the substantive law of constitutional libel. If so, then the plaintiff would be permitted to inquire into every aspect of the defendant's state of mind at the discovery stage with little or no inhibition.

"Malice," even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs . . . .

376 U.S. at 293 (Black, *J.*, concurring). Mr. Justice Goldberg elaborated further by noting that the right to criticize official misconduct, " 'to speak one's mind' . . . about public officials and affairs . . . should not depend upon a probing by the jury of the motivation of the citizen or press." *Id.* at 298 (Goldberg, *J.*, concurring) citations and footnote omitted). And in his footnote two, Mr. Justice Goldberg quoted from Mr. Justice Jackson's dissent in *United States* v. *Ballard*, 322 U.S. 78, 92-93 (1944), that it is difficult to separate, practically or philosophically, "what is believed" from "what is believable." 376 U.S. at 298-99 n.2 (Goldberg, *J.*, concurring). Professor Emerson has written that the actual malice rule is

> subject to the very same defects that led the majority of the [*Sullivan*] Court to reject broader tests of liability[,] . . . . leaves the speaker with roughly the same degree of risk as the earlier rules of negligence and engenders approximately the same amount of self-censorship . . . [and] imposes . . . an impossible problem of judicial administration.

T. Emerson, *supra* note 18, at 535-36.

Professor Emerson also attacks the *Sullivan* majority's rationale, set forth in *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), that calculated falsehood is no essential part of any exposition of ideas as inconsistent with the concept of *Sullivan* itself. *See* T. Emerson, *supra*, at 536. But even inferior federal courts know that upon occasion judicial opinions may involve compromises in expression to reach a result in fact; here there was at least a procedural accommodation, note 24 *supra*.

However persuasive these arguments might be if we were writing on a clean slate, as an inferior court we are of course bound to follow the rule of *Sullivan*. Thus the editor's state of mind, not vis-à-vis the plaintiff, but vis-à-vis the truth or falsity of what is being published about the plaintiff, is a proper focus of inquiry.

Second, we might decide that while *Sullivan* has generally struck the substantive balance, it does not preclude restraint on compelled discovery, specifically where First Amendment values are unnecessarily threatened by the nonconstitutional interest in liberal discovery. We could adapt the test developed in the disclosure of confidential source cases: evidence of the editorial process is discoverable only when it is *direct* evidence of a *highly* relevant matter which cannot otherwise be obtained.[27] And finally, we might opt for the conclusion that the editorial process is subject to constitutional privilege and that actual malice must be proved by evidence other than that obtained through compelled disclosure of matters at the heart of the editorial process.

The answer is not free of doubt. Strict logic leading to the selection of option one has surface appeal. Approach number two seems like a reasonable compromise at first blush. But in the delicate area of precious First Amendment liberty, *see Baker* v. *F & F Investment*, *supra*, 470 F.2d at 785, a subtly discerning eye is necessary. Hard cases make for hard choices; vision must not only be acute, it must also be peripheral.

The argument of strict logic—that the *Sullivan* test of knowing-or-reckless-falsity assumes open-ended discovery for the purpose of proving actual malice—is deficient in several respects. First, the *Sullivan* Court in no way indicates that it is doing anything more than setting forth substantive rules. It does not deal with the method of proving actual malice.[28] Actual malice can be proved in

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27 *See* note 36 & accompanying text *infra*.

28 Appellee argues that *Tornillo* and *Columbia Broadcasting* have not affected media liability under *Sullivan* and its progeny, relying on the Court's reaffirmation of the *Sullivan* liability standard in *Gertz* v.

a number of ways. Logical inferences from the inconsistency, say, between a television program's content and contrary facts which a plaintiff might independently establish would provide an obvious starting point for such proof.[29] Moreover, a plaintiff might adduce circumstantial evidence from participants or interviewees on the television program. In this case, for example, documents furnished under the Freedom of Information Act indicate that Lando's state of mind may be provable without directly impinging on the editorial process.[30] While I offer

Robert Welch, Inc., supra, 418 U.S. at 342, decided on the same day as *Tornillo.* Brief for Appellee at 29 & n.*. This argument, however, overlooks the distinction between standards of liability and the means of proving liability under the appropriate standard. *Tornillo* and *Columbia Broadcasting* have not altered the substantive law of libel established in *Sullivan.* They articulate broad First Amendment protection of editorial process decisions. The issue, then, is simply whether and to what extend this protection encompasses compulsory disclosure of the mental processes of editors. The free press principles of these cases are being applied to limit a procedural rule, not to alter the substantive law of libel.

29 A case in our court goes further perhaps than any other in permitting proof of bad motive directed toward the plaintiff to show the reckless disregard of truth that the actual malice test of *Sullivan* requires. *See Goldwater* v. *Ginzburg,* 414 F.2d 324, 342 (2d Cir. 1969), *cert. denied,* 396 U.S. 1049 (1970) ("evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity"). *Goldwater,* however, was not concerned with the boundaries of plaintiff's discovery into the editorial process but rather dealt principally with the sufficiency of the evidence adduced and the correctness of the judges charge to the jury on the appropriate standard of substantive law.

30 The documents, prepared by Lieutenant Colonel F. B. Reed, Jr., indicate that in anticipation of the broadcast Lando told Colonel Reed that "Lando's stated premise is that Herbert is a liar and he has stated that if he can't develop a sufficient number of incidents in which Herbert's account can not [sic] be debunked, then there will be no story." Brief for Appellee at 56 (Exhibit I). On December 4, 1972, Lando interviewed Colonel J. Ross Franklin. During the interview, at

no opinion on the admissibility or adequacy of this evidence to prove actual malice, it is clear that an editor's state of mind can be examined without discovering facts at the heart of the editorial process. Limiting discovery to those matters and persons not at the heart of the editorial process does not transform the *Sullivan* rule into a nullity for putatively libeled public figures. They *can* prove actual malice without endangering the editorial process which *Tornillo* held to be protected by the First Amendment.[31]

Second, the *Sullivan* balance, by permitting plaintiffs the opportunity to prove actual malice, deems a certain level of chilling-effect fallout to be consistent with the First Amendment.[32] However, permitting compelled discovery

which Reed was present, Lando "persist[ed] in [his] contention that he is interested in debunking Herbert. . . . After the interview he informed me that Mike Wallace has agreed to do the narration and is equally convinced that the story is in debunking Herbert. Lando asserts that he has [the] final decision on the segment and it will not go unless he can convincingly portray Herbert as the bad guy." *Id.* at 57 (Exhibit II). The third document reveals that on December 20, 1972, Lando in a meeting with Major General Sidle "indicated that his peice [sic] is aimed at debunking Herbert in his long fight against the the Army. Further Lando indicated that he would focus some attention on the failure of the media to check out Herbert's story prior to 'puffing him up'. [Sic.] He plans to focus on four or five events whcih [sic] are contained in Herberts [sic] book and factually destroy Herbert's credibility." *Id.* at 58 (Exhibit III).

31 Limiting plaintiff's discovery concededly may deprive him of adducing the best proof of malice in the common law sense of ill will toward the plaintiff. But *Sullivan* itself distinguishes common law malice from actual malice. Limiting proof of actual malice as defined in *Sullivan* resembles other rules of evidence which limit the "search for truth" in the interests of a higher social policy. *See, e.g.,* Fed. R. Evid. 407, precluding introduction of subsequent remedial measures to prove negligence in order to encourage the promotion of safety.

32 *Hotchner* v. *Castillo-Puche,* 551 F.2d 910 (2d Cir. 1977), *cert. denied,* 46 U.S.L.W. 3202 (U.S. Oct. 4, 1977), provides an excellent example

of the editorial process would indubitably increase the level of chilling effect in a way ostensibly not contemplated by *Sullivan*. Thus, it is one thing to tell the press that its end product is subject to the actual malice standard and that a plaintiff is entitled to prove actual malice; it is quite another to say that the editorial process which produced the end product in question is itself discoverable. Such an inquiry chills not simply the material published but the relationship among editors. Ideas expressed in conversations, memoranda, handwritten notes and the like, if discoverable, would in the future "likely" [33] lead to a more muted, less vigorous and creative give-and-take in the editorial room. This incremental chilling effect exceeds the level of chilling effect contemplated by the *Sullivan* balance.

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of the inhibiting effect that *Sullivan* may exercise on First Amendment freedoms. In *Hotchner*, the defendant had written a biography of Ernest Hemingway with uncomplimentary references to the plaintiff, a public figure. Prior to publication the editor, pursuant to recommendations of the legal department of Doubleday & Co., Inc., suggested that a number of passages "be eliminated or toned down." *Id.* at 912. Even though the author "vouched for the statements" in his manuscript, he "accepted the suggested modification." *Id.* The self-censorship was nonetheless imposed despite the fact that it may have been unnecessary in view of the court's subsequent conclusion that "[w]here a passage is incapable of independent verification, and where there are no convincing indicia of unreliability, publication of the passage cannot constitute reckless disregard for truth." *Id.* at 914.

33 *See Lamont* v. *Postmaster General*, 381 U.S. 301, 307 (1965) (postal regulation that those wishing to receive "communist political propaganda" had to request it of the Post Office held unconstitutional because "any addressee is *likely* to feel some inhibition" at doing so (emphasis added)); *Talley* v. *California*, 362 U.S. 60, 64 (1960) (requirement that the names and addresses of those who wrote and/or sponsored the distribution of handbills held unconstitutional because it "would *tend* to restrict freedom to distribute information and thereby freedom of expression" (emphasis added)).

Finally, the fatal flaw of the strict logic position is its failure even to consider *Tornillo*'s and *Columbia Broadcasting*'s ramifications. It ignores the special status which the Free Press guarantee accords to the editorial process.[34]

The compromise position is similarly defective. While taking account of *Tornillo*'s mandates, it falls short of the protection required by *Sullivan* and *Tornillo*. Admittedly, the compromise test accounts for the argument advanced above that evidence of actual malice is obtainable from sources other than compelled discovery of editors' state of mind because the compromise test itself requires that the evidence be not otherwise obtainable.[35] However, the incremental chilling effect engendered by this test, while not as great as in the case of uninhibited discovery, is still significant. First, the editorial relationship may be chilled if its dynamics are subject to forced scrutiny. The knowledge that in a certain number of cases the editorial process will be discoverable is itself likely to chill that process, because no editor can visualize when a court will consider relevancy to be "high" or evidence to be "direct" or "otherwise unobtainable." Beyond this, the compromise test is vague, difficult of application, and hence likely to be the subject of constant litigation.[36] In effect, the discovery process itself, and the resulting litigation over the "directly-related," "highly-relevant" and "otherwise-unobtainable" standards,

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34 I do not make the distinction between the institutional press and the individual pamphleteer which Judge Meskill suggests in dissent, *post* at 267. Rather, the distinction I draw is between communicative functions properly protected under the Free Press clause and expression protected by the Free Speech guarantee.

35 Of course, the number of instances that the evidence is in fact not otherwise obtainable in some form should be few. This does not mean that the chilling effect in the editorial room would be concomitantly reduced. The fear of such discovery and of the full scale utilization of the litigation process as permitted by the compromise test are likely to stifle the flow of ideas in the editorial room.

36 *See New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 277-78.

are not merely likely to make editors more cautious, but inevitably will require them to be. The chilling effect of the compromise test is, therefore, of a greater degree than that tolerated by *Sullivan* with the gloss of *Tornillo* and *Columbia Broadcasting.*

There is an additional reason for rejecting the compromise position: it developed in a very different context from that at issue here. *Baker* v. *F & F Investment, supra,* 470 F.2d at 783-84, in its discussion of *Garland* v. *Torre,* 259 F.2d 545 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958), indicates that the appropriate standard for compelled disclosure of journalists' sources in civil litigation is that the evidence is closely related to the very essence of the plaintiff's case and that the information is not obtainable from other sources.[37] However, in *Baker* and *Garland* very different First Amendment interests were at stake from those at issue here. In those cases, the information sought to be disclosed, whether or not vital to the plaintiff's case, was far removed from the editorial process. In this case, the plaintiffs do not seek discovery on the periphery of the editorial process. That they have already done, as Chief Judge Kaufman notes, to the tune of 2,903 pages in deposition testimony and of 240 exhibits. Rather, plaintiffs now seek to discover the very heart of the editorial process. This they may not do consistently with *Tornillo*'s and *Columbia Broadcasting*'s solicitude for the editorial process. I, therefore, would conclude that *Tornillo, Columbia Broadcasting* and *Sullivan* mandate full protection of the editorial process from compelled disclosure. This is true

37 *Cf. Branzburg* v. *Hayes, supra* (rejecting argument of journalists who had witnessed crimes that they were not obliged to testify before grand juries with respect thereto). In *Baker* v. *F & F Investment, supra,* 470 F.2d at 783, the Second Circuit distinguished *Branzburg* and thereby protected journalists from compelled disclosure of sources in civil litigation.

because as soon as facts are set in their context there is editorial selection; as soon as that process is subject to scrutiny, there is a suppression effect; and as soon as there is such an effect, the freedom of the press has evaporated.

IV

I pass then to when editorial process immunity from compelled disclosure is properly invoked. The parameters of the editorial process concept will become more definite in the context of future cases. The obvious starting point, however, is the Chief Justice's delineation in *Tornillo:* "[t]he choice of material" to go into the broadcast, "the decisions made" on the duration and "content" of the broadcast, and "treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." 418 U.S. at 258. Thus, *Tornillo* mandates that the mental processes of the press regarding "choice of material," duration, and "content" of the broadcast are to be protected from scrutiny.[38]

At this stage of the proceedings we are not capable of determining which discovery demands fall within the editorial process privilege. I agree with the Chief Judge that at least five of the broad categories into which the district court grouped plaintiff's questions seemingly fall within the privilege. Each area of dispute relates to Lando's conclusions, opinions, intentions, or conversations concerning

38 To the extent that *Buckley* v. *Vidal,* 50 F.R.D. 271 (S.D.N.Y. 1970), is inconsistent with this opinion, this court obviously now declines to follow it.

While the question need not be answered here, I would assume that the very same protection would be afforded the press in a trial on the merits. Compelled testimony at trial on matters privileged from compelled pretrial discovery should similarly be privileged, because this case concerns privilege, not undue oppression. *See* text accompanying notes 7-9 *supra.*

people or leads to be pursued, the veracity of persons interviewed, and Lando's reasons for the inclusion or exclusion of certain material. By permitting interrogation into these areas of editorial selection, the judiciary improperly intrudes upon freedom of the press just as the Florida legislature did in *Tornillo*. Whether the intrusion is judicial or legislative, the result is an unconstitutional suppression effect. There may, however, be individual questions inappropriately grouped within the protected categories. I think it is open to the district judge to determine in specific instances that Lando was not engaged in the process of editorial selection. With these caveats I concur in the general answer to the certified question and in the remand to the district court for a determination of the nature of each question in dispute.

MESKILL, *Circuit Judge* (dissenting):

I respectfully dissent. In this action, Anthony Herbert alleges that he has been libeled by Barry Lando, Mike Wallace, C.B.S. and Atlantic Monthly. Under *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), he may prevail if he proves that the defendants acted with "actual malice," that is, knowing or reckless disregard of the truth. The major purpose of this lawsuit, therefore, is to expose the defendants' subjective state of mind—their thoughts, beliefs, opinions, intentions, motives and conclusions—to the light of judicial review. Obviously, such a review has a "chilling" or deterrent effect. It is supposed to. The publication of lies should be discouraged. The discovery by a libel plaintiff of an editor's state of mind will not chill First Amendment activity to any greater extent than it

is already being chilled as a result of the very review permitted by *New York Times* v. *Sullivan*. The majority's attempt to eliminate or reduce that chill is supportable in neither precedent nor logic.

The plaintiff in a libel action bears the heavy burden of proving actual malice by clear and convincing proof. The notion that a plaintiff carrying such a burden should be denied the right to ask what the defendant's mental state was is remarkable on its face. In my view Judge Haight was quite right to apply the normal rules of discovery and to permit inquiry into the defendants' mental state.

Chief Judge Kaufman finds a basis for creating a new editorial privilege in "the privilege established by *Branzburg* [v. *Hayes*, 408 U.S. 665 (1972)]," *ante* at 227, and in the Supreme Court's decisions in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) (right of reply statute), and *C.B.S., Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) (editorial advertising), which deal generally with the protections afforded to "the exercise of editorial control and judgment." 418 U.S. at 258. By combining the *Branzburg* privilege with the *Tornillo* and *C.B.S.* protections for editing, the Chief Judge creates an editorial privilege. Judge Oakes adopts a somewhat different approach. He too relies on *Branzburg*, *Tornillo* and *C.B.S.*, but he goes further and, relying primarily on a speech given by Mr. Justice Stewart at the Yale Law School, extracts from the free press clause a doctrine which appears to convert the fourth estate into an institution not unlike an unofficial fourth branch of government. This fourth branch is given a special privilege presumably for the same reasons that the three official branches are given executive, congressional and judicial privileges.

I find neither approach persuasive. Contrary to the suggestions of my colleagues, there is presently no constitutional privilege against disclosure of a journalist's confidential sources, either in the criminal context, *Branzburg* v. *Hayes, supra,* or in the civil context, *Garland* v. *Torre,* 259 F.2d 545 (2d Cir.) (Stewart, *J.*) (libel action), *cert. denied,* 358 U.S. 910 (1958). *Baker* v. *F & F Investment,* 470 F.2d 778 (2d Cir. 1972), *cert. denied,* 411 U.S. 966 (1973), which is cited by the majority as supporting such a privilege, merely held that a district judge in a civil case did not abuse his discretion in denying a motion to compel a non-party journalist to disclose the identity of a confidential news source where the identity of the source was of questionable materiality to the plaintiff's cause of action and could be obtained by other means. The Court explained:

> Although it is safe to conclude, particularly after the Supreme Court's decision in *Branzburg* . . . that federal law does not recognize an absolute or conditional journalist's testimonial "privilege", neither does federal law require disclosure of confidential sources in each and every case, both civil and criminal, in which the issue is raised.

470 F.2d at 781. The decision stands for the proposition, with which I wholeheartedly agree, that the public interest reflected in the First Amendment and in State "newsman's privilege" statutes is entitled to be considered when a district judge exercises discretion with regard to discovery matters. The decision recognized no privilege. In view of *Branzburg* and *Garland* it could not have. *See also Caldero* v. *Tribune Publishing Co.,* 98 Idaho 288, 562 P.2d

791, *cert. denied,* 46 U.S.L.W. 3288 (U.S. Oct. 31, 1977); *Carey* v. *Hume,* 492 F.2d 631 (D.C. Cir.), *cert. dismissed,* 417 U.S. 938 (1974). Thus, to the extent that the majority relies on "the privilege established by *Branzburg*" and its elaboration in *Baker,* today's decision is without precedential foundation.

The *Tornillo* and *C.B.S.* decisions also provide little support for the privilege created by the majority. Those cases establish that when the government tries to control what is published or broadcast the courts may find an unconstitutional "intrusion into the function of editors." 418 U.S. at 258. Neither decision supports the unqualified "proposition that the First Amendment will not tolerate intrusion into the decisionmaking function of editors." *Ante* at 248 (Oakes, *J.*, concurring). Some intrusions, such as those which occur when the press is required to publish or broadcast views with which it disagrees, are prohibited. Other intrusions, such as the intrusion inherent in all libel actions, are permitted. *See generally Branzburg* v. *Hayes, supra,* 408 U.S. at 681-85. The intrusion against which the majority seeks to protect editors is the chilling effect that "judicial review of the editor's thought processes," *ante* at 232, will have on the "exercise of editorial judgment." *Id.* at 232; 253-254 (Oakes, *J.*, concurring). After *New York Times* v. *Sullivan,* however, judicial review of the editor's thought process is what a libel action is all about. The mere existence of a libel cause of action chills the exercise of editorial judgment. That is the whole idea. It is exactly this kind of chill that *New York Times* v. *Sullivan* condones.

Judge Oakes' argument based on the "structural or institutional aspect of the Free Press guarantee," *ante* at 250, is troubling for two reasons. First, I doubt whether

it can be considered to add anything to the Chief Judge's arguments based on *Branzburg, Tornillo* and *C.B.S.* Second, before the Court can recognize any special, preferred position for the press as an institution, it must necessarily recognize a distinction between personal rights on the one hand and institutional rights on the other. "Freedom of the press is a 'fundamental personal right' " which encompasses "the right of the lonely pamphleteer who uses carbon paper or a mimeograph" as well as that of "the large metropolitan publisher who utilizes the latest photocomposition methods." *Branzburg* v. *Hayes, supra,* 408 U.S. at 704, *quoting, Lovell* v. *Griffin,* 303 U.S. 444, 450 (1938). If we distinguish between institutional and personal rights to liberty of the press and place the former in a preferred position, then we necessarily place the latter in a subordinate position. The First Amendment interest of the public in having access to the truth is not necessarily better served by an institution than an individual. I would recognize such a distinction only with the greatest reluctance, and I would certainly not do so on the basis of a single speech, even one given by Mr. Justice Stewart. *Compare Saxbe* v. *Washington Post Co.,* 417 U.S. 843 (1974), in which the Supreme Court, per Mr. Justice Stewart, held that journalists have no special access to information not available to the public generally.

It makes no sense at all for us to construct a privilege designed to eliminate or reduce a chill on expressive activity which is already generated by the libel action itself. I do recognize, however, that some of the discovery sought by Herbert, particularly the conversations sought in the fourth of the five categories of assertedly objectionable inquiries, *ante* at 239, has a potential for what Judge Oakes

refers to as an "incremental" chilling effect, *ante* at 260-261, over and above that contemplated by *New York Times* v. *Sullivan.* The discovery of communications between editors and journalists, as distinguished from subjective mental states, may well have the effect of inhibiting "the free interchange of ideas within the news room." *Ante* at 232, 253 (Oakes, *J.,* concurring). If the press were forced to disclose all of the ideas and theories that are explored during the editorial process, then intellectual exploration itself would be discouraged—without necessarily, or even probably, deterring irresponsible journalism. By thus discouraging "the creative verbal testing, probing, and discussion of hypotheses and alternatives which are the *sine qua non* of responsible journalism," *ante* at 232; *see* 259-60 (Oakes, *J.,* concurring), discovery of the communications sought under category four could have an incremental chilling effect not built into the *New York Times* v. *Sullivan* libel action. The operation of this incremental chill is actually rather conventional in nature. It is the same sort of chill that forms the basis for most privileges: a chill on the expression of ideas or the communication of information in the context of certain special, lawful, confidential relationships. However, a moment's reflection will reveal that a privilege sufficient to eliminate this incremental chill would have to be exceedingly broad. All confidential communications, whether oral or written and whether made in the newsroom or elsewhere, would have to be covered. It seems to me that if such a privilege were really necessary to protect the editorial function, we would have heard about it long before now. Like the Supreme Court in *Branzburg,* I would be "unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination." 408 U.S. at 703.

Appendix A—Opinion of the Court of Appeals

The Supreme Court has shown no enthusiasm for the creation of new constitutional privileges, particularly where, as here, they are based on claims of chilling effect that depend on the imaginations of judges rather than proof supplied by the parties. *Compare Branzburg* v. *Hayes, supra,* 408 U.S. at 693-95, *with N.A.A.C.P.* v. *Alabama ex rel. Patterson,* 357 U.S. 449, 462 (1958) (in support of its claim of a privilege against disclosure of the identity of its rank-and-file membership, the NAACP made an "uncontroverted showing" that exposure had in the past led to harassment of its membership).

I would affirm Judge Haight's order compelling discovery.

APPENDIX B

Memorandum and Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 434-CSH

ANTHONY HERBERT,

Plaintiff,

—against—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

Defendants.

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HAIGHT, *District Judge:*

Plaintiff in this defamation action seeks an order compelling discovery pursuant to Rule 37(a)(2), F.R.C.P. Defendants vigorously resist the motion. The case presents interesting questions, one of which, insofar as the excellent briefs of counsel and the Court's own research indicate, is one of first impression. That question is:

Within the context of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) and its progeny, and the heavy burdens of proof they place upon "public figure" plaintiffs in defamation actions, what are the proper boundaries of pre-trial discovery?

I.

The plaintiff is Lieutenant Colonel Anthony B. Herbert (U.S. Army, Ret.) ("Herbert"). He has brought an action for defamation against defendants Columbia Broadcasting System, Inc. ("CBS"), Mike Wallace ("Wallace"). Barry Lando ("Lando") and Atlantic Monthly Company ("Atlantic"). The subjects of the action are a broadcast presented by CBS on its 60 MINUTES Program, produced by Wallace and Lando, and an article subsequently published by Atlantic and written by Lando.

Herbert alleges that both the program and the article maliciously portrayed him as a liar, one who had committed acts of brutality and atrocities in Viet Nam and an opportunist seeking to use the war crimes issue to cover his own alleged failures in the Army.

Col. Herbert, a much-decorated Army officer, was stationed in Viet Nam from September, 1968 until early April, 1969, first as Acting Inspector General for the 173rd Airborne Brigade and thereafter as Commanding Officer of the 2nd Battalion of the Brigade until he was relieved of his command on April 4, 1969. Herbert has consistently contended that, while in Viet Nam with the 173rd Brigade, he observed and was distressed by many war crimes and atrocities, committed by American troops. According to Herbert's account, he reported these events to his superior officers, a Col. Franklin and a General Barnes; and, when these officers took no action in respect of Herbert's reports, Herbert brought formal charges against Franklin and Barnes. These charges resulted in an investigation by the Army, the results of which are not material to this motion.

During the course of these activities, Col. Herbert received considerable publicity. It is conceded that, in consequence, Herbert is a "public figure" as defined by the United States Supreme Court in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), and more recently in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 345 (1974):

> "Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures . . .
>
> "For the most part, those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public fig-

ures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment."

On February 4, 1973 CBS broadcast a program in its television series 60 MINUTES. A major segment of that telecast concerned Col. Herbert. Herbert alleges in this suit that the program falsely and maliciously portrayed him as a liar in his assertions that he had reported atrocities to Col. Franklin or General Barnes; as a man capable of brutality to Vietnamese prisoners; and as a person who had used the war crimes charges against his superior officers as an excuse for his own relief from command.

Defendant Lando was the producer of the telecast in question; defendant Wallace was the narrator and one of the interviewers. In its May, 1973 issue, defendant Atlantic published an article by Lando about Herbert, which discusses the 60 MINUTES Program, Lando's activities in producing the program, and a book which Herbert had written entitled "Soldier". Herbert puts forward comparable allegations of defamation in respect of the Atlantic article.

The defendants deny that the statements concerning Herbert appearing in the telecast or the article are false. In addition, defendants deny knowledge of any falsity that may be present, or that they proceeded with reckless disregard of truth or falsity. Thus defendants, as they are of course entitled to do, cast upon Herbert the onerous burden of proof that applies in cases of this nature, as summarized recently by the Second Circuit in *Buckley* v. *Littell,* 539 F.2d 882, 889-890 (2d Cir. 1976):

"The appellee, a public figure, must rather have demonstrated with convincing clarity not only that the appellant's statements were false, but that appellant knew

they were false or made them with reckless disregard of their truth or falsity."

II.

Herbert has launched extensive pre-trial discovery, including the taking of depositions of the defendants and notices to produce documents pursuant to Rule 34. Numerous disputes arose, both in respect of answering questions on depositions and producing documents. Counsel for the parties worked effectively and in a good spirit of cooperation to narrow the areas of dispute. Additional issues were resolved by the Court following a hearing. At that hearing, the remaining areas of dispute were reserved for decision, following the submission by counsel of further memoranda. Those remaining disputes will be considered in this opinion.

III.

Many of the issues arise out of the deposition of defendant Lando, the producer of the 60 MINUTES telecast and the author of the Atlantic article. Upon a number of occasions, counsel for Lando instructed him not to answer questions posed by counsel for Herbert. Herbert now seeks an order compelling answers to those questions.

The questions involved are numerous, and will not be set forth here. They may for convenience be separated into areas of inquiry, which the main brief for defendants CBS, Wallace and Lando (pp. 2-3) accurately summarizes as follows:

"1. Lando's conclusions during his research and investigation regarding people or leads to be pursued, or not to be pursued, in connection with the '60 Minutes' segment and the *Atlantic Monthly* article;

"2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to veracity of persons interviewed;

"3. The basis for conclusions where Lando testified that he did reach a conclusion with respect to persons, information or events;

"4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication;

"5. Lando's intentions as manifested by the decision to include or exclude material;

"6. Conversations between Lando and source persons subsequent to the inception of this action;

"7. Lando's activities as well as conversations between Lando, Wallace and/or other CBS employees concerning Herbert or the '60 Minutes' segment between broadcast and publication of the Atlantic Monthly article."

In addition, disputes exist with respect to Herbert's following discovery demands:

1. Production of a CBS memorandum prepared by a CBS "house" attorney in response to an inquiry made by Lando, under circumstances to be discussed below.

2. Questions and demands concerning communications between Atlantic and its counsel involving Lando's manuscript and the article which ultimately appeared in Atlantic.

3. Herbert also demands production of documents in the possession of CBS, Wallace or Lando during stated periods of time, regarding Herbert, the 173rd Airborne Brigade while in Viet Nam, individuals appearing or referred to on the 60 MINUTES segment, and the events described in Herbert's book "Soldier", and documents relating to communications or correspondence with Herbert's literary agent, the publishers of his book, and employees

of Atlantic concerning Herbert, his charges, the truth and accuracy of the 60 MINUTES segment, or any individual appearing or quoted thereon. The particular area of dispute in respect of this documentation concerns production of such documents that were in the possession of the parties indicated at the stated times, but which were not specifically known to Wallace or Lando at the time the telecast was being produced.

These areas of dispute will be considered in order. Preliminarily, however, it is necessary to consider in greater detail what plaintiff must prove in order to recover. That question is inextricably interwoven with the proper boundaries of pre-trial discovery.

IV.

Defendants rely upon their First Amendment guarantee of the freedom of speech, with particular reference to "public figures". In *Goldwater* v. *Ginzburg,* 414 F.2d 324, 335 (2d Cir. 1969), the Second Circuit stated succinctly:

> "False statements are protected only if they are honestly made."

That is a distillation of the Supreme Court's holding in *Garrison* v. *Louisiana,* 379 U.S. 64-75-6 (1964):

> "Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

Thus there are two kinds of statements that are not protected:

(1) the *knowingly false* statement; and

(2) the false statement *made with reckless disregard of the truth.*

These constitutionally unprotected creatures are obviously of different species. *Knowledge* of falsity is a necessary element of the first; that is not so in respect of the second. Identification of the first species turns upon an objective question of fact: did the defendant know the statement was false? Either he did or did not; if he did he is cast in damages; if he did not he is exonerated.

The second species of unprotected false statement is at once more subtle, complex and subjective. The concept of "reckless disregard for truth" inevitably carries the trier of the facts into the thought processes of the defendant: the evaluation and balancing he made of conflicting information available to him; the misgivings he may have suppressed when deciding to publish.

Thus the Supreme Court has defined false statements made in "reckless disregard for truth" as those made with "a high degree of awareness of their probable falsity", *Garrison* v. *Louisiana, supra*, at 74. Mr. Justice Harlan's opinion in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 153 (1967) speaks of publication "despite the publisher's awareness of probable falsity." In *St. Amant* v. *Thompson*, 390 U.S. 727, 731, 732 (1968), Mr. Justice White said that reckless disregard is present if the publisher "in fact entertained serious doubts as to the truth of his publication", or where "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports". In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 334 n. 6 (1974), the Court noted that the *St. Amant* test "equated reckless disregard of the truth with subjective awareness of probable falsity . . ."

Whether or not the present defendants "entertained serious doubts" as to the truth of the statements about Herbert, or had a "subjective awareness of probable falsity", are questions of crucial relevance. No one disputes that. The question is how a plaintiff in Herbert's position

proves such elements as doubt or awareness in the minds of the defendants—or, to be more precise within the context of the present motion, what discovery procedures he may legitimately summon to his aid.

V.

The Court observed at the beginning of this opinion that the question presented is, in substantial part, one of first impression. That is because, with a sole exception, the defamation cases cited in the briefs of counsel deal with the totality of the evidence adduced on the merits. That is to say, these cases arise on motions for summary judgment, or on motions or appeals after trial. Only one case focuses upon the appropriate boundaries of discovery within the context of a "public figure" defamation suit, and it is limited to discovery of documents.

That case is *Buckley* v. *Vidal*, 50 F.R.D. 271 (S.D.N.Y. 1970), a decision by Judge Levet of this court. Plaintiff alleged that he had been defamed by the defendant's statements in television programs, and in articles appearing in magazines. The plaintiff sought production, under Rule 34, of a wide variety of manuscripts, correspondence, notes, memoranda and other material prepared by defendant or exchanged between defendant and the magazines and television station in question, editors, agents, or employees, or persons engaged as investigators by the defendant, or relating in any manner to the statements in suit. The defendant interposed First Amendment objections; and also argued that plaintiff had failed to show "good cause" for the production, and that certain of the documents were covered by the attorney-client privilege.

Judge Levet overruled the first two objections, and reserved his ruling on the third for an *in camera* examination of the documents as to which privilege was asserted. On the First Amendment point, he commented on the heavy burden

of proof borne by a plaintiff in such cases, and viewed that burden as a basis for liberal pre-trial discovery:

> "In the case at bar, it seems that plaintiff is obligated to delve into the realm of defendant's conduct, motivation and belief in order to recover, at least with regard to statements directed to public conduct of the plaintiff.
>
> "Although in recent years the Supreme Court has placed stringent burden of proof requirements on a public official or public figure suing for defamation, such plaintiffs may still recover if they sustain their heavy burdens. As long as a cause of action for defamation passes constitutional muster, a plaintiff must be allowed reasonable opportunity for discovery. Defendant's objection to production and inspection on broad First Amendment grounds is therefore overruled." 50 F.R.D. at 273-4.

On the "good cause" objection, the court said, in directing disclosure of material received by defendant concerning plaintiff for a period of six years prior to the publications in suit:

> "In light of the nature of this action and the burden of proof that may be imposed on plaintiff, as discussed above, I do not believe the 1962 date is too remote." 50 F.R.D. at 274.

In keeping with the rationale of *Buckley* v. *Vidal,* I conclude that a "public figure" plaintiff in a defamation action is entitled to liberal interpretation of the rules concerning pre-trial discovery. I intimate no view on the merits of the present case; but one cannot close one's eyes to the possibility of malicious publications or statements concerning public figures. If the malicious publisher is permitted to increase the weight of the injured plaintiff's already heavy burden of proof by a narrow and restricted application of the discovery rules, so that the plaintiff is denied discovery into areas which in the nature of the case lie solely with the defendant, then the law in effect provides an arras behind which malicious publication may go undetected and unpunished. Nothing in the First Amendment requires such a result.

There is another general principle applicable to this case in its present stage of development. Defendants argue in their briefs that many of the areas into which Herbert wishes to inquire would not constitute admissible evidence, in the light of the pertinent cases. Some of these contentions are considered further *infra.* But it may be noted generally that, under Rule 25(b)(1), F.R.C.P.:

> "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Courts have given a broad scope to this language, which was added to the Rule by amendment. 4 *Moore's Federal Practice* (2d ed. 1976), ¶26.56[5] at p. 26-179. Judge Lumbard, concurring in *United States* v. *Matles,* 247 F.2d 378, 383 (2d Cir. 1957), *rev'd on other grounds,* 356 U.S. 256, said:

> "This language [Rule 26(b)] is clearly designed to be broad enough to cover almost anything that will help the examining party to discover any leads to evidence."

It is, of course, true that the matter as to which discovery is sought be "relevant" to the subject matter of the action. In the light of these principles, I turn to the particular areas of dispute.

VI.

The first five areas of dispute, listed on page 6 *supra,* relate to Lando's conclusions, opinions and intentions, formulated during the period of time that he was researching and preparing the television program and the Atlantic article, with particular reference to people or leads to be pursued or not to be pursued, the veracity of persons interviewed, and the reasons why certain material was included or excluded. Lando was repeatedly instructed by counsel not to answer such questions during his deposition (the inquiries in question appear in Appendix A to defendants' main brief).

Defendants interpose a broad-scale objection to these lines of inquiry. They contend that inquiry into opinions, conclusions, the basis of conclusions, and intent cannot be permitted because it is irrelevant, constitutes a violation of First Amendment privilege and also the privilege of "editorial judgment".

I reject these contentions. Where, as here, the defendant's state of mind is of central importance to a proper resolution of the merits, it is obvious that these lines of inquiry may lead, directly or indirectly, to admissible evidence. As in all cases, civil or criminal, turning upon the state of an individual's mind, direct evidence may be rare; usually the trier of the facts is required to draw inferences of the state of mind at issue from surrounding acts, utterances, writings, or other indicia. In *Goldwater* v. *Ginzburg,* 414 F.2d 324, 342 (2d Cir. 1969), *cert. den.,* 396 U.S. 1049, the Court made this point forcibly in considering the trial judge's charge:

> "The trial court, appellants also argue, erroneously permitted the jury to find actual malice from evidence of negligence and ill will. The record is to the contrary. The court below not only charged the jury but

> also emphasized in the charge that neither negligence nor failure to investigate, on the one hand, nor ill will, bias, spite, nor prejudice, on the other, standing alone, were sufficient to establish either a knowledge of the falsity of, or a reckless disregard of, the truth or falsity of the materials used. Moreover, the court properly instructed the jurors that they should consider *all the evidence concerning appellants' acts and conduct* in publishing Fact in deliberating upon whether the defendants published with actual malice. There is no doubt that *evidence of negligence, of motive and of intent* may be adduced for the purpose of establishing, *by cumulation and by appropriate inferences,* the fact of a defendant's recklessness or of his knowledge of falsity. See, e.g., Curtis Publishing Co. v. Butts, supra." (emphasis added).

The publisher's opinions and conclusions with respect to veracity, reliability, and the preference of one source of information over another are clearly relevant. It is no answer for the defendants to say that they accurately repeated the words of certain of their interviewees. In *Goldwater* v. *Ginzburg, supra,* the Second Circuit observed:

> "Repetition of another's words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, *or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his reports.* St. Amant v. Thompson, supra at 732, 88 S.Ct. 1323." 414 F.2d at 337 (emphasis added).

The lines of inquiry under discussion are entirely appropriate to Herbert's efforts to discover whether Lando had any reason to doubt the veracity of certain of his sources, or, equally significant, to prefer the veracity of one source

over another. It is quite apparent that Col. Herbert, at the times in question, was a controversial figure, highly regarded in certain quarters, but viewed with considerably less favor in others. Herbert is entitled to full discovery on these lines of inquiry. He is equally entitled to discovery on whether Lando's investigation and research was negligent, and the lines of inquiry under consideration bear upon this issue as well. Nothing in the *Times* case or its progeny holds that evidence of negligence can never be relevant or admissible on the issue of malice. The Second Circuit also makes this clear in *Goldwater* v. *Ginzburg*:

> "As already stated, supra, *Times* does not hold that evidence of negligence is inadmissible; it only holds that evidence which merely establishes negligence in failing to discover misstatements, without more, is constitutionally insufficient to support the finding of recklessness required to establish actual malice from proof of less than prudent conduct. Recklessness is, after all, only negligence raised to a higher power. To hold otherwise would require that plaintiff prove the ultimate fact of recklessness without being able to adduce proof of the underlying facts from which a jury could infer recklessness. It would limit successful suits to those cases in which there is direct proof by a party's admission of the ultimate fact, certainly a situation not intended by the Supreme Court. See St. Amant v. Thompson, supra, 390 U.S. at 732-733, 88 S.Ct. 1323." 414 F.2d at 343.

See also *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), and in particular the discussion under Point II, pp. 391-4, in which the Supreme Court considers the sort of activities, evaluations and opinions on the part of a publisher or its representatives which could permit the trier of the fact to draw the inference of reckless disregard of truth.

Finally, under this heading, I find no substance in the argument defendants base upon the "editorial judgment" concept. Cases such as *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) and *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), deal with statutes or regulations purporting to specify what newspapers or broadcasting stations must print or say. *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), deals with a newspaper reporter's obligation to respond to a grand jury subpoena and inquiry. These cases have nothing to do with the proper boundaries of pre-trial discovery in a defamation suit alleging malicious publication.

VII.

Items 6 and 7 of the disputed issues (p. 6 *supra*) relate to conversations between Lando and source persons subsequent to the inception of the action; and to Lando's activities as well as conversations between Lando, Wallace or other CBS employees concerning Herbert or the television program, between broadcast and publication of the Atlantic Monthly article.

Defendants object to these lines of inquiry on the basis that inquiry into post-publication activities, writings or statements is irrelevant, and cannot possibly lead to the discovery of admissible evidence.

I cannot accept this latter proposition. As noted above, the case turns upon subjective aspects of the defendant's state of mind. To be sure, it is the state of mind at the time of publication that controls; but how can it reasonably be contended that post-publication statements or activities *could not* form the basis for an inference as to pre-publication state of mind? I do not say that such evidence will be adduced; I only hold that, under the discovery rules, Herbert is entitled to inquire. It is well settled that statements after the act, stating the past in-

tent or motive at the time of the act, are usable against a defendant as admissions. 6 *Wigmore on Evidence* (3rd ed. 1940) at §1732, p. 103. See also *Glasser* v. *United States*, 315 U.S. 60 (1941) (alleged conspiracy on part of government prosecutors and private counsel to defraud United States in respect of prosecution of liquor cases; evidence was admitted that a defendant, one Roth, asked an Assistant United States Attorney to use his influence to stop the investigation; this evidence held admissible: "The statements of Roth were not in furtherance of the conspiracy, but they did tend to connect Roth with it by explaining his state of mind." 315 U.S. at 82.) Compare *United States* v. *Matot*, 146 F.2d 197 (2d Cir. 1944) (in prosecution for bank fraud, where fraudulent intent was a necessary element of the crime, *held* it was error to exclude evidence of accused's subsequent interview with bank president, since conversation could be read as "confirmation of his denial that he had ever contemplated a fraud," 146 F.2d at 198).

Furthermore, in the case at bar defendant Lando was directly concerned with two publications: the television broadcast on February 4, 1973, and the Atlantic article in May, 1973. Obviously, the activities of Lando during this interim period of time are relevant. In *Airlie Foundation, Inc.* v. *Evening Star Newspaper Co.*, 337 F.Supp. 421 (D.D.C. 1972), the court considered a several-publication libel suit. The court noted the possibility that "the publisher's initial evaluation of his story and his decision to publish will be undercut by subsequent developments." The court in *Airlie* recognized that, under Supreme Court holdings, later events "may have no probative value as they relate to earlier publications", citing *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 55 (1971); and that information revealed after the first publication, insofar as it bears on the publisher's investigative efforts, need not

necessarily be taken as evidence of malice, citing the *Times* decision at 376 U.S. 287. But the court went on to observe, in a discussion which illuminates the considerations pertinent to the present case:

> "But while it is well established that a failure to investigate, without more, is insufficient to give rise to liability, once one has undertaken to conduct an investigation he should not be permitted to ignore with impunity the fruits of that investigation . . .
>
> "Here the defendant attempted to obtain confirmation or denial of the charges from the Director of the CIA after initial publication. The Star's editor testified that he received an emphatic denial, one which, in his own words, left him 'considerably shaken.' Nevertheless, the Star again published an account of the Higgs press conference the following day. While the headline featured Dr. Head's denial, the text included several details not raised by Higgs, including, among others, the CIA refused to comment. Faced with this testimony and evidence there was a basis established with convincing clarity upon which the jury might well have concluded these details were known by the Star to be false and were added by it to lend credence to the Higgs charges at a time when it entertained serious doubts as to the validity of those charges. Accordingly, the Court concludes that the evidence was sufficient to go to the jury on the question of whether the Star published 'with knowledge that it was false or with reckless disregard of whether it was false or not' as required by the New York Times case." 337 F.Supp. at pp. 427-8.

Again, I of course express no view as to whether Herbert will succeed in developing any useful evidence as

the result of post-publication inquiry. I hold only that he is entitled to such inquiry under the discovery rules.

VIII.

The next disputed item involves a CBS memorandum prepared by one of its "house" attorneys under the following circumstances.

During his deposition, Lando testified that sometime after the broadcast Col. Franklin telephoned him. Franklin told Lando he was contemplating an action against Herbert, and asked if his (Franklin's) attorney could talk to Lando. Lando replied that he did not know; he would "have to check with CBS to see" (722). Lando testified:

> "The information that I conveyed to CBS was that Franklin's attorney had contacted me—by that time Franklin had contacted me, told me he was bringing suit over the book, and wanted to know if I would speak to his attorney to give him information. I believe that is what I relayed to CBS." (725).

Lando's inquiry produced the document under consideration. It is a memorandum dated July 17, 1973, written by Michael J. Goldey, an attorney on the staff of the CBS Law Department. The memorandum was addressed to (1) David Klinger, Vice President and Assistant to the President of CBS News, and in charge of liaison between the Law and News Departments; (2) Don Hewitt, the executive producer of the 60 MINUTES program; and (3) Joseph M. Walsh, the General Attorney, Publishing, with initial responsibility for rendering legal advice on matters relating to CBS's publishing operations. Copies of the memorandum were sent to John D. Appel (Deputy General Counsel), Ralph E. Goldberg (General Attorney for Governmental Affairs), and Lando.

The thrust of the memorandum, Lando testified, was "that my position would be that there would be no contact, no information given to Franklin or his attorney for this suit" (724). Accordingly Lando advised Franklin's attorney that "I could not give them any information whatsoever" (722).

CBS, Lando and Wallace invoke the attorney-client privilege in respect of this memorandum. Herbert contends that, in the circumstances of the case, the privilege either does not apply or has been waived.

I start with the observation that the memorandum in question is a communication from an attorney to a client,[1] and not from a client to an attorney. The distinction is significant, because of the rationale underlying extension of the privilege to the attorney's communications. "The reason for it", says Wigmore,[2] "is not any design of securing the attorney's freedom of expression, but the necessity of preventing the use of his statements as admissions of the client, or as leading to inferences of the tenor of the client's communications . . ."

In *United States* v. *Silverman*, 430 F.2d 106 (2d Cir. 1970), *cert. den.*, 402 U.S. 953 (1971), the Second Circuit held that no privilege attached to minutes delivered by a client to its attorney, because the minutes were a matter of public record. The court applied and interpreted Wigmore's analysis:

> "The privilege as commonly formulated refers to a confidential communication from the client to the attorney. 8 Wigmore, Evidence §2292 (McNaughton rev. ed. 1961); compare Uniform Rule of Evidence 26 ('between lawyer and his client'). Wigmore states that the reason for bringing communications from the at-

[1] The attorney-client relationship extends to "house" counsel and members of the corporate control group. *Burlington Industries* v. *Exxon Corp.*, 65 F.R.D. 26 (D.Md. 1974).

[2] 8 *Wigmore on Evidence* (McNaughton rev., 1961), §2320, p. 629.

torney to the client within the privilege is to prevent adopted admissions or inferences of the tenor of the client's communication. 8 Wigmore, Evidence §2320 (McNaughton rev. ed. 1961). The purpose of the privilege, the encouragement of full disclosure to the attorney in procuring legal advice, implies that a communication from an attorney is not privileged *unless it has the effect of revealing a confidential communication from the client to the attorney.*" 430 F.2d at 122 (emphasis added).

Judge Moore's opinion quotes with approval this discussion from *United States* v. *United Shoe Machinery Corp.*, 89 F.Supp. 357, 359 (D.Mass. 1950):

> "'It follows that in so far as these letters to or from independent lawyers were prepared to solicit or give an opinion on law or legal services, such parts of them are privileged *as contain, or have opinions based on, information furnished by an officer or employee of the defendant in confidence and without the presence of third persons.* • • •
>
> "'However, • • • there is no privilege for so much of a lawyer's *letter, report or opinion as relates to a fact gleaned from* • • • *a public document* such as a patent, cf. Edison Electric Co. v. United States Electric L[ighting] Co., [44 F. 294 (C.C.S.D.N.Y. 1890)].'" (emphasis added).

Another statement of the underlying rationale appears in *Georgia-Pacific Plywood* v. *United States Plywood Corp.*, 18 F.R.D. 463, 464 (S.D.N.Y. 1956):

> "Since communications by the attorney to the client *might reveal the substance of a client's communication* they are also within the privilege." (emphasis added).

In *United States* v. *International Business Machines Corp.*, 66 F.R.D. 206 (S.D.N.Y. 1974), Chief Judge Edelstein reviewed these authorities and concluded:

> "In light of the clear guidance from the Second Circuit on this matter and because the approach recommended by the Masters coincides with the purpose of the attorney-client privilege, this court is constrained to reject defendant's formulation of the attorney-client privilege as it applies to communications from lawyers to their clients. This court will abide by the view that such communications are privileged *only to the extent that they reveal confidential information communicated by the client to the lawyer.* Accordingly, the proper focus of the Masters' inquiry must be whether or not the document as to which privilege is claimed can be said *to reveal such a communication.*" 66 F.R.D. at 212 (emphasis added).

Applying these principles to the case at bar, it is apparent that certain difficulties arise with respect to defendants' claim of privilege. The memorandum in question does not automatically achieve privileged status because its author was an attorney. Nor is privileged status automatically conferred by the fact that the memorandum may express an opinion of counsel; opinions are privileged only to the extent that they are based upon, and consequently reveal, information furnished by the client in confidence.

In the case at bar, it is somewhat difficult to see how Lando's inquiry, prompted by the telephone call from Col. Franklin, can be viewed as "confidential information communicated by the client to the lawyer", *United States* v. *International Business Machines Corp., supra.* It is not even certain that Lando directed his inquiry to one of the CBS legal staff; he speaks only in terms of conveying

the information of Franklin's request "to CBS". But we may assume that Lando directed his inquiry to a member of the legal staff; in any event, the question ultimately found its way there, and was apparently dealt with by Mr. Goldey. But the question remains: How can it be said that disclosure of the memorandum would have "the effect of revealing a confidential communication from the client to the attorney", in the words of *United States* v. *Silverman, supra*? Lando's communication has already been revealed in his deposition testimony: "Franklin is thinking of suing Herbert, and wants me to talk to his attorney —shall I do it?" Revelation of that inquiry having already been accomplished, there is no basis for contending that the responsive memorandum is privileged because it might tend to reveal the inquiry.

It may be, however, that the contents of the memorandum contain information, comments, or opinions which are based upon or reveal confidential communications addressed to counsel by other CBS officers or employees. The Court cannot determine this question without examining the document. Accordingly, counsel for the defendants are directed to furnish the Court with a copy for inspection *in camera*. There is ample authority for proceeding in that manner. See *In Re Grand Jury Subpoena Duces Tecum*, 391 F.Supp. 1029, 1033 (S.D.N.Y. 1975).

Herbert also argues that the memorandum is beyond the scope of the attorney-client privilege because (a) it deals with business advice, rather than legal advice; and (b) Lando is not within the "control group" of CBS employees, so that, at the very least, the forwarding of a copy of the memorandum to him waived the privilege. I reject these arguments. Lando's inquiry was clearly intended to evoke legal, not business or professional, advice. Franklin contemplated litigation against Herbert; Lando was asked to confer with Franklin's attorney; the Legal

Department of CBS took the question under advisement. Potential lawsuits and actual attorneys were in the air; this is the atmosphere within which counsel live, move, and have their being. It is unreasonable to characterize the incident as one involving business or professional advice. As for the "control group" contention, giving full force to that line of authority and assuming without deciding that Lando falls outside the group, the individuals to whom the memorandum was addressed clearly fall within the group, and I decline to hold that the receipt by Lando of a copy constitutes a waiver binding upon all defendants, individual and corporate.

IX.

The discovery disputes between Herbert and the defendant Atlantic concern the following two items:

(1) Herbert's request for discovery of Atlantic's communications with its counsel on the subject of the Lando article printed in Atlantic in May, 1973, such communications having taken place prior to publication; and

(2) Herbert's request for discovery of Atlantic's internal communications and communications with Lando, subsequent to the receipt by Atlantic of a "bill of discrepancies" prepared by Herbert's literary agent, one Gerard McCauley, and sent to Atlantic more than four months after publication.

These disputes are considered in order.

While the subject of pre-publication communications between Atlantic and its attorney, Conrad Oberdorfer, Esq., of the firm of Choate, Hall & Stewart in Boston, has generated considerable discussion in the briefs, it would appear that we are concerned with only one communication. It appears from the affidavit of Robert Manning, the Editor-in-Chief of Atlantic, that on March 9, 1973

he received a letter from Mr. Oberdorfer. Mr. Oberdorfer wrote to Manning, presumably in response to the latter's prior request, in order to give his advice on the proposed Lando article, and to recommend that Manning raise certain questions about the article with Lando. Manning sent Oberdorfer's letter on to Lando for his comments. The forwarding by Atlantic of counsel's letter to Lando, of course, waived any attorney-client privilege that might otherwise have obtained; and Atlantic has quite properly produced the March 9 Oberdorfer letter to Manning, and Atlantic's forwarding letter of March 13 to Lando, for inspection by Herbert. Manning's affidavit recites that, apart from these two letters, "Atlantic had only one communication with its attorney during the pre-publication period. This was a brief letter from Atlantic to Mr. Oberdorfer during the period before Oberdorfer's March 9, 1973 letter." The Court has no basis to doubt Mr. Manning's sworn statement, and plaintiff suggests none. Accordingly this area of dispute appears to be limited to that one "brief letter" from Atlantic to its counsel, written before the March 9, 1973 letter from counsel to Atlantic which has already been produced.

There is substantial authority for the proposition that voluntary disclosure of privileged matter to a third party waives the privilege, at least with respect to the particular subject matter involved in the disclosure.

In *In Re Penn Central Commercial Paper Litigation*, 61 F.R.D. 453, 464 (S.D.N.Y. 1973), this court said in an opinion by Chief Judge Edelstein:

> "The theoretical predicate underlying all recognized privileges is that secrecy and confidentiality are necessary to promote the relationship fostered by the privilege. Once the secrecy or confidentiality is destroyed by a voluntary disclosure to a third party,

> the rationale for granting the privilege in the first instance no longer applies."

The court added that "a claim of privilege cannot be selectively waived", citing, among other cases, *Lee National Corp.* v. *Deramus*, 313 F.Supp. 224 (D.Del. 1970), in which the court held that a party's free and voluntary revelation of otherwise privileged communications with its counsel on a particular subject matter (by-law and charter amendments) constituted a waiver of the attorney-client privilege with respect to that particular subject matter. The court observed:

> "Fairness demands that all occasions when this subject matter was discussed with counsel be revealed." 313 F.Supp. at p. 227.

In the case at bar, Atlantic requested counsel's advice in respect of the intended Lando article. Counsel's response, in the form of the March 9, 1973 letter, was then voluntarily disclosed by Atlantic to a third party, namely, Lando. Assuming *arguendo* that the March 9 letter was originally privileged, the privilege was lost by disclosure to Lando. It follows that any pre-publication communications between Atlantic and its counsel on that particular subject matter are no longer protected by the privilege. If the pre-March 9 "brief letter" from Atlantic to counsel deals with the same subject matter as the March 9 letter, then the prior letter must be revealed.[3] In order that a proper determination may be made, I direct that the Court be furnished with a copy of the letter in question for examination *in camera*.

The post-publication discovery disputes involving Atlantic turn upon quite different facts. Printed copies of

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[3] See also *Garfinkle* v. *Arcata National Corp.*, 64 F.R.D. 688, 689 (S.D.N.Y. 1974).

the May, 1973 issue of the Atlantic magazine became available in mid-April. It appears from the affidavit of C. Michael Curtis, an associate editor of Atlantic, that copies of the issue were sent, as soon as they became available, on April 17, 1973 to Herbert, his literary agent McCauley, and certain other individuals. Atlantic took this action because of a prior request it received from McCauley, in the latter part of March, 1973, McCauley having evidently learned of the intended Lando article, and having asked if Atlantic could print a reply by Herbert in the same issue. Curtis had advised McCauley that such an arrangement could not be made.

Ultimately, McCauey forwarded to Curtis, as an enclosure to a letter dated August 16, 1973, a typed list of 27 "discrepancies" in connection with the Lando article which appeared in Atlantic. These "discrepancies" consist, in sum, of Herbert's points of disagreement with factual assertions in the Lando article. This document was accompanied by 44 pages of documentation intended to support Herbert's position. McCauley's forwarding letter to Curtis describes the enclosure as "a list of 27 items which seem to contradict Barry Lando's article"; the letter concludes:

> ". . . I look forward to receiving some response from *The Atlantic.*"

The Curtis affidavit says:

> "Upon receipt of the 'bill of discrepancies', I sent copies both to defendant Barry Lando, the author of the article, and to Atlantic's counsel, and discussed it with other editors at the Atlantic. This was followed by communications back and forth, primarily in writing, concerning Herbert's charges as itemized by McCauley and the way in which those charges might be met. It is such communications, undertaken when

> we knew that litigation was likely, and with a view to deciding how we should answer plaintiff's charges, that plaintiff now seeks to discover."

As appears from the Curtis affidavit, Atlantic takes the position that the Herbert list of discrepancies was compiled by Herbert in anticipation of suing Atlantic, so that Atlantic's subsequent communications, prompted by the Herbert list, are vested, in addition to customery attorney-client privilege, with the protection afforded by Rule 26(b)(3), F.R.C.P.

Herbert denies that his list of discrepancies was prepared at a time when he was contemplating litigation against Atlantic. He ascribes to other reasons the fact that he did not reply to the Atlantic article until four months after Atlantic had sent him a copy (Atlantic relies upon this delay as evidence of Herbert's intention to litigate, rather than to obtain a correction from Atlantic).

I conclude, without undue difficulty, that the communications referred to were made "in anticipation of litigation", as that phrase is used in Rule 26(b)(3). Of course, it is not decisive on the issue that Col. Herbert had not yet commenced suit against Atlantic. In the landmark case of *Hickman* v. *Taylor*, 329 U.S. 495, 511 (1947), the Supreme Court stated that the work-product privilege extends to those documents prepared "with an eye toward litigation". This court has said, in *Stix Products, Inc.* v. *United Merchants & Manufacturers, Inc.*, 47 F.R.D. 334, 337 (1969):

> "If the prospect of litigation is identifiable because of specific claims that have already arisen, the fact that, at the time the document is prepared, litigation is still a contingency has not been held to render the privelege inapplicable."

Herbert's list of discrepancies, while not referring specifically to an intent to litigate, may certainly be regarded as

"specific claims" that he caused to arise in respect of the Lando article. Professor Wright reminds us:

> "Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." 8 Wright and Miller, *Federal Practice and Procedure* (1970) at §2024, p. 198.

Herbert's communication to Atlantic clearly gave rise to the "prospect of litigation", and it would have been imprudent for Atlantic to conclude otherwise. Communications may be characterized as having been carried on "with an eye toward litigation", even though they were prompted by a desire to avoid, and not prepare for, a possible suit. *Vilastor-Kent Theater Corp.* v. *Brandt*, 19 F.R.D. 522 (S.D.N.Y. 1956). While a showing of a "remote possiblility of litigation" is not sufficient to invoke Rule 26(b)(3), *Garfinkle* v. *Arcata National Corp.*, 64 F.R.D. 688, 690 (S.D.N.Y. 1974), I conclude that the present case cannot be so characterized. This is so, even accepting Herbert's statement that "in going over the errors in Lando's article with McCauley", he did not contemplate a lawsuit at that time. The seeds of prospective litigation had been sown; they ultimately came to fruition; and I cannot agree with plaintiff that, once Herbert's communication had been received by Atlantic, the prospects of the litigation which eventually came to pass were so remote that the Rule does not apply.

However, that is not an end of the inquiry. Rule 26(b)(3) permits discovery of "documents and tangible things" covered by the Rule, upon a showing by the party seeking the discovery that he "has substantial need of the materials

in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[4] The only mandatory protection afforded by the Rule appears in its last sentence, which directs the trial court to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

I hold that, in the circumstances of this case, Herbert has made the requisite showings of need and hardship. While Atlantic argues that post-publication communications cannot possibly be relevant, I have reached a contrary conclusion with regard to the other defendants' comparable argument (see Point VII, *supra*), and reach the same conclusion here. In this regard, I cannot wholly accept Atlantic's characterization of itself as nothing but a "conduit" through which Lando was expressing his views. The article, Exhibit B to the complaint, is entitled: "The Herbert Affair, by Barry Lando". The article is prefaced, however, by the following paragraph, presumably the "work product" of an Atlantic editor, and not Lando:

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[4] Rule 26(b)(3) provides in full:

> "Trial Preparation: Materials. Subject to the provisions of subdivision (b) (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b) (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

"He seemed to be the perfect soldier, a hero in Korea and in Vietnam. Then he was driven out of the Army, his career ruined because he tried to prevent his superiors from concealing war crimes against the Vietnamese. That was the story a television producer persuaded his superiors at CBS should be presented to a nationwide audience. As the producer and his associates began assembling the facts, they found it changing into a very different story, one that left the reporter disillusioned and the hero threatened with decanonization. The producer here tells how the case unfolded for him, from his first, convincing interviews with Lieutenant Colonel Anthony Herbert, through intensive researching of Herbert's alarming charges against fellow Army officers, to a dramatic confrontation between Herbert and some of those who disputed him on the CBS program, Sixty Minutes, shown on February 4 of this year. It is a tangled story, to say the least. One of its lesser anomalies: Herbert's book Soldier, now profitably riding the best-seller list, is published by Holt, Rinehart and Winston, which is owned by CBS, the organization that has done the most to attack the book's integrity."

While perhaps stopping short of placing its own *imprimatur* upon the truth of Lando's assertions, Atlantic's references to "intensive researching" by Lando which "left the reporter disillusioned and the hero threatened with decanonization" may have served to give that impression. In any event, it is apparent that post-publication communications, involving Atlantic and other members of its corporate family, or Atlantic and Lando, may lead to the discovery of admissible evidence on the issue of pre-publication state of mind, on the part of both Lando and the Atlantic editors.

In consquence, the Court's ruling on this aspect of the case is that counsel for Atlantic are to submit to the Court all pertinent documents for *in camera* inspection, so that the protection mandated by the last sentence of the Rule can be assured. In respect of any continued or future oral depositions, counsel for plaintiff are directed not to inquire in respect of "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative" of Atlantic "concerning the litigation"; and Atlantic's witnesses are not obliged to answer such questions if asked.

X.

The final area of dispute relates to Herbert's demand for production of:

". . . documents in the possession of CBS news, Wallace or Lando during the period June 1, 1971 to February 4, 1973 (to May, 1973 in regard to Lando) regarding Col. Herbert, the 173rd Airborne Brigade while in Vietnam, individuals appearing or referred to on the 60 Minutes segment and events described in *Soldier* . . . which were not specifically known to Wallace and Lando at the time the program was being produced."

Herbert's counsel contends that such documents, even if not specifically known to Wallace or Lando at the time of production of the telecast, nevertheless may lead to the discovery of admissible evidence relating to whether the defendants "published the charged libel in reckless disregard of its truth or falsity." (affidavit of counsel, para. 3).

The defendants contend that documents in the files of the corporate or individual defendants, of which the individual defendants were not aware at the time of publication, cannot possibly be relevant in respect of their state of mind at the time of publication. Particular reliance is

placed upon *New York Times* v. *Sullivan, supra*, in which it was said:

> "Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. There was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable under the Times' policy of rejecting advertisements containing 'attacks of a personal character'; their failure to reject it on this ground was not unreasonable. We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." 376 U.S. at p. 287-8.

While this Court fully recognizes the impact of the *Times* decision, the particular language of the opinion must be considered within the context of the facts of the case. The alleged libel in *Times* consisted of a full-page advertisement that the newspaper carrier, which included statements, some of them false, about police action allegedly

directed against students who participated in a civil rights demonstration. The newspaper published the advertisement upon an order from a New York advertising agency acting for the signatory committee; the agency submitted the advertisement with a letter from A. Philip Randolph, chairman of the committee, and well known to the Times advertising acceptability department as a responsible person. Mr. Randolph certified that the persons whose names appeared on the advertisement had given their permission.

In the case at bar, the Herbert story did not come to CBS, Lando or Wallace unsolicited and through the mail. On the contrary, it was at Lando's initiative that the Herbert story came into being; he did the investigations; and CBS and Wallace, together with Lando, worked together in assembling and putting on the air the program which resulted from Lando's efforts. This situation, in my judgment, is quite different from the fact situation presented in *Times*, which turned upon the question of whether members of the advertising department should have checked the files of the news department in respect of statements in an advertisement which had come, unsolicited and entirely without their own inquiry into the facts, to the attention of the advertising department.

In *Goldwater* v. *Ginzburg, supra*, the Second Circuit considered the contention of the defendants that the trial court erred in permitting the head of a public opinion survey organization to testify that the defendants did not use a valid method of conducting the poll of psychiatrists to which they referred in their unflattering article about Senator Goldwater. That evidence, the defendants argued, was irrelevant "for at most it would only tend to show that appellants were negligent pollsters." 414 F.2d at 343. The Second Circuit disagreed, observing that the *Times* case "does not hold that evidence of negligence is inadmissible; it only holds that evidence which merely establishes neg-

ligence in failing to discover misstatements, *without more*, is constitutionally insufficient to support the finding of recklessness required to establish actual malice from proof of less than prudent conduct." 414 F.2d at 343 (emphasis added).

As previously noted, *Goldwater* v. *Ginzburg* teaches that evidence of reckless disregard for truth must be viewed in its totality. Thus, as one of the elements in that case "tending to prove actual malice", the Second Circuit observed that "the seriousness of the charges called for a thorough investigation but the evidence reveals only the careless utilization of slipshod and sketchy investigative techniques." 414 F.2d at 339.

If, as *Goldwater* v. *Ginzburg* indicates, the utilization of "slipshod and sketchy investigative techniques" can be considered as evidence of actual malice, then the question arises: Could the material sought by discovery lead to the development of such evidence? The concept is stated in terms of possibility, since that is the context within which requests for discovery must necessarily be viewed. The Court concludes that the question must be answered in the affirmative. Assume, for the sake of discussion, that the CBS telecast contained false statements concerning Herbert, the falsity of which would have been demonstrated by documents then in possession of CBS, Lando or Wallace. The *Times* decision does not brand as inadmissible the failure of an investigatory reporter to consult the files of his own newspaper (or television news facility) before publishing a false and defamatory statement which examination of those files would have prevented.[5] Again, I do not

[5] One may hypothesize a situation from another chapter of military history. Assume that, following Custer's defeat at the Little Bighorn, an investigative reporter for a leading newspaper researched the causes of the defeat, and wrote an article which his newspaper printed, which advanced the proposition that Major Reno withdrew, not as the result of Indian action, but because of the ill-advised order of one General X who was in the area and inserted himself into the chain of command. Assume further that, at the time of publication, the newspaper's files contained stories demonstrating that, when the battle occurred, General X was in Europe on a military mission. I cannot accept that, in General X's subsequent suit for defamation against the reporter and the newspaper, such a disregard of readily available information would not be admissible as one possible indication, to be considered by the trier of the fact together with any other indicia, on the question of reckless disregard for the truth. (I am further assuming for this discussion that General X was a "public figure", and that the *Times* case and its progeny had been decided by the Supreme Court at the time of Custer's last stand.) The distinction lies, as the Second Circuit points out in *Goldwater* v. *Ginzburg*, *supra*, between the insufficiency of negligent investigation standing alone, and its admissibility into evidence as one factor among several, on the issue of reckless disregard. The present defendants argue, in essence, that because negligent investigation without more is not sufficient in law to establish reckless disregard, it cannot be considered, together with other elements, as part of the overall proof. That is a *non-sequitur*, and the missing link in the chain of logic is supplied neither by *Times* and its progeny nor the First Amendment.

say that such facts actually exist in the case at bar; but Herbert is entitled to inquire.

However, the scope of inquiry indicated by the affidavit of counsel for plaintiff, at para. 3, is unduly broad, and compliance would be too burdensome to the defendants to justify full compliance. Production is demanded of documents "regarding Col. Herbert, the 173rd Airborne Brigade while in Vietnam, individuals appearing or referred to on the 60 MINUTES segment, and events described in *Soldier*." Quite obviously, there could be many references in the files to the Brigade's service in Vietnam which would have nothing to do with this litigation. That is equally true of events described in Col. Herbert's book. Plaintiff is entitled to discovery of such documents as might exist in the files, and which relate specifically to the contents of the telecast and the article in Atlantic.

For the guidance of counsel in implementing this opinion, I direct that documents in the following categories, existing in the indicated files at the indicated times, be produced:

1. Any documents prepared by, pertaining to or mentioning Herbert; John Barnes; Ross Franklin; John Douglas; a Col. Rector; Kenneth Rosenblum; Richard Heintz; Bruce Potter; Robert Stemmies; Michael Plantz; William Hill; James Grimshaw; John Bettorie.

2. Any documents pertaining to or mentioning the February 14, 1969 "St. Valentine's Day Massacre" in Viet Nam.

3. Any documents pertaining to or mentioning the presence or absence of Col. Franklin in Viet Nam on February 14, 1969, including references to individuals interviewed on that subject.

4. Any documents referring to the service of the 173rd Airborne Brigade in Viet Nam during Herbert's tour of duty there.

These categories are not intended to be all-inclusive. They are intended, however, to demonstrate that the defendants are not obligated to produce reams of material which have no direct bearing upon the issues posed by the allegedly libelous publications.

XI.

Herbert also contends that Lando, during his deposition, failed to respond fully to questions which were not made the subject of objections. Since the hearing on this case, counsel for Herbert have withdrawn a number of demands that further answers be furnished. I have examined the remaining questions, and agree with plaintiff's counsel that the answers previously given do not entirely track with

the questions. Presumably, as the result of this opinion, Mr. Lando will be deposed further. Plaintiff's counsel may, if they wish, again put the questions under consideration to Mr. Lando, and further answers will be required.

XII.

The foregoing constitutes the Court's order in this matter. I perceive no present need for the settlement of a further order. Counsel for the parties should be able to proceed in the case, in a manner consistent with this opinion and order. However, should the necessity for further applications arise, they may be addressed to the Court.

With respect to the documents that are to be furnished to the Court for inspection *in camera*, further rulings will be announced as soon as that process has been accomplished.

It is So Ordered.

Dated: New York, New York
January 4, 1977

/s/ Charles S. Haight, Jr.
Charles S. Haight, Jr.
U.S.D.J.

APPENDIX C

Memorandum Opinion and Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 434-CSH

ANTHONY HERBERT,

Plaintiff,

—against—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

Defendants.

HAIGHT, *District Judge:*

On January 4, 1977, this Court issued its Memorandum and Order determining certain questions that had arisen with respect to the proper scope of plaintiff's pre-trial discovery. Defendants Lando, Wallace and CBS now move this Court for certification of an interlocutory appeal, pursuant to 28 U.S.C. §1292(b).[1]

[1] "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

Appendix C—Memorandum Opinion and Order

Plaintiff opposes certification. Defendant Atlantic Monthly Company takes no position on the question, because the issues sought to be raised by its co-defendants on the potential appeal do not involve Atlantic Monthly.

For the reasons appearing below, I grant the requested certification, and amend the Order of January 4, 1977 accordingly.

I.

This Court's Memorandum and Order of January 4, 1977 set forth in detail the nature of the case, and the issues presented and resolved. For the sake of the following discussion, familiarity with that prior opinion is assumed.

In essence, this Court's prior Memorandum and Order granted to Lieutenant Colonel Herbert, a "public figure" plaintiff in a defamation action, the right to conduct pretrial discovery, by means of oral depositions and discovery of documents, in areas which defendants Lando, Wallace and CBS strenuously contend are sacrosanct. Specifically, these defendants contend that such a plaintiff is not entitled to discovery in the area of what defendants refer to as their exercise of "editorial judgment".

As this Court observed in its original opinion, the proper breadth and scope of such a plaintiff's pre-trial discovery is a question of first impression, which must be determined within the context of considerations that arise out of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) and its progeny. Those considerations include: the scope of protection given by the First Amendment to publishers or other media who direct their attentions to "public figures"; the bases upon which such figures may hold publishers and media liable for defamation, notwithstanding that First Amendment protection; and the proper function of pretrial discovery procedures, having in mind the plaintiff's bases of liability, the burden of proof he bears, and the

defendant's First Amendment rights. In preparing its original Memorandum, the Court could find no case, and counsel cited no case, which considered the proper use of the full arsenal of pre-trial discovery weapons within this particular context. It was for that reason that the Court characterized the basic issue decided as one of first impression.

II.

Plaintiff, resisting certification, contends that piecemeal appeals are disfavored in general, and that they are inappropriate to discovery orders in particular. There is substantial force to these contentions; however, interlocutory appeals on questions relating to discovery are by no means unknown. Thus, pre-trial discovery orders have been reviewed by writs of mandamus, *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964) (question involving validity and construction of Rule 35(a), F.R.Civ.P., providing for physical and mental examination of defendant in a negligence action), as well as by certification under 28 U.S.C. §1292(b), *Carey* v. *Hume*, 492 F.2d 631 (D.C.Cir. 1974), *cert. dismissed*, 417 U.S. 938 (1974) (order under Rule 37(a), F.R.Civ.P., compelling defendant newspaper reporter, in libel action, to disclose identity of eyewitness sources).

These cases teach us that, whereas interlocutory appeals from discovery orders may be rare, circumstances can arise which render them appropriate. Thus in *American Express Warehousing, Ltd.* v. *Transamerica Insurance Co.*, 380 F.2d 277, 282 (2d Cir. 1967), the Second Circuit stated generally:

> "When a discovery question is of extraordinary significance or there is extreme need for reversal of the district court's mandate before the case goes to judgment, there are escape hatches from the finality rule:

> a certification by the district court under 28 U.S.C. §1292(b), apparently not sought here, or an extraordinary writ."

The *American Express Warehousing* case denied a writ of mandamus in respect of the district court's order directing the production of certain documents for discovery. Judge Feinberg's majority opinion, after reviewing the touchstones for mandamus review specified by the Supreme Court in *Schlagenhauf, supra,* denied mandamus because the district court had the power under the discovery rules to order production of the documents in question; there was no abuse of discretion in the order; and the district court's holdings:

> "... involve application of well-known law to commonplace fact, and rested on the district judge's appraisal of facts and exercise of discretion." 380 F.2d at p. 283.

In view of this latter consideration, Judge Feinberg concluded that an issue of first impression was not presented, as had been the case in *Schlagenhauf*.

In the case at bar, defendants seek to avail themselves of the alternative "escape hatch from the finality rule": certification under §1292(b). The statute sets forth its own touchstones. Certification is appropriate only if the district judge concludes that his opinion: (1) "involves a controlling question of law", (2) as to which there is "substantial ground for difference of opinion"; and that (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

In response to defendants' present motion, I must consider whether these three elements are present in the case at bar.

III.

"A Controlling Question of Law"

I have concluded that the validity or non-validity of defendants' contention that the concept of "editorial judgment" acts as a bar to discovery is of sufficient magnitude, both practical and theoretical, to rise to the level of "a controlling question of law."

As pointed out in this Court's prior opinion, and particularly at page 9, the Supreme Court has repeatedly held that a "public figure" plaintiff may recover in a defamation suit if he can establish that false statements were made in "reckless disregard for truth". The thrust of this Court's prior opinion is that, if "reckless disregard for truth" is a basis for liability, it necessarily follows that a plaintiff is entitled to discovery of the selective aspects of the editorial process; otherwise, he would never be able to prove (a) whether there had been "disregard" of available and accurate source material, and (b) whether such "disregard" could properly be characterized as "reckless". I believe my prior order to have been correct, and the discovery mandated thereby to be appropriate. If it is not, however, the practical consequences upon the plaintiff, in respect of preparing his case for trial and sustaining a heavy burden of proof, would appear to be so substantial as to approach an issue of controlling significance. Compare *Garner* v. *Wolfinbarger*, 430 F.2d 1093, 1097 (5th Cir. 1970) (certification under §1292(b) granted with respect to district court's order denying availability of attorney-client privilege in suit by stockholders against corporation: "Review under §1292(b) is available where decision on an issue would affect the scope of the evidence in a complex case, even short of requiring complete dismissal"); *Time, Inc.* v. *McLaney*, 406 F.2d 565, 566 (5th Cir. 1969) (§1292(b) certification granted following denial of motion for summary judgment in libel suit; the Fifth Circuit, while recognizing the limited availability of interlocutory appeals, observed that: "The subject matter of this litigation, involving, as it does the very serious and timely question of how far the First Amendment guarantee of freedom of the press may still be impinged upon by actions for libel, places some cases in a somewhat different category.")

Certification in the case at bar also seems indicated by the Second Circuit's discussion in *Investment Properties International Ltd.* v. *IOS, Ltd.*, 459 F.2d 705 (2d Cir. 1972), granting mandamus in respect of the district court's vacating of plaintiff's notices of deposition. The court stated:

> "Judge Bonsal clearly had the power to vacate plaintiffs-petitioners' notices of deposition. Fed.R.Civ.P. 26(c)(1). Nevertheless, the issue here is one of first impression, and the vacation reveals, through its consequences, an abuse of discretion. *Discovery here, furthermore, is not a matter of mere 'housekeeping,'* see American Express Warehousing, Ltd. v. Trans-America Insurance Co., supra, 380 F.2d at 284, *but is the heart of the controversy*, for on it turns plaintiffs-petitioners' right to be in court. The order below makes it virtually impossible to discover the facts on which jurisdiction and standing turn, and thus puts the plaintiffs-petitioners in a cul-de-sac which the Federal Rules never contemplated." 459 F.2d at p. 707 (emphasis added).

While I recognize that *Investment Properties* arose out of a petition for mandamus, rather than certification under §1292(b), the practical considerations reflected in the language just quoted from Judge Oakes' opinion seem equally pertinent here.

It has been recognized that, in the light of the *Schlagenhauf* case, circumstances may arise where a precise question of law needs to be "decided by an advance supervisory ruling", Gurfein, Ct. J., concurring in *Kaufman* v. *Edelstein*, 539 F.2d 811, 823 (2d Cir. 1976). I have concluded that this is such a case.

"As to Which There is Substantial Ground for Difference of Opinion"

I conclude that this second element is present, primarily because, as noted above, this is a question of first impression. That is a factor stressed by the *Schlagenhauf* case, within the mandamus context, and cases which have followed it. That particular factor seems equally pertinent within the context of §1292(b).

Quite obviously, the fact that a district judge has carefully considered a question and arrived at a decision does not automatically bar his subsequent certification that there is "substantial ground for difference of opinion." Presumably district judges always do what they think is right; but they are bound to consider whether substantial grounds for "difference of opinion" exist, and, where the decision is one of first impression, so that the judge is sailing (or believes himself to be) as a first voyager through undiscovered and uncharted seas, he should be inclined to find that the second element is satisfied. It is quite a different matter if the district court's order is just another implementation of an established line of authority.

"An Immediate Appeal from the Order May Materially Advance the Ultimate Termination of the Litigation"

While I am mindful of Judge Lumbard's observation, dissenting in *American Express Warehousing, Ltd.* v. *Transamerica Insurance Co.*, *supra*, at 380 F.2d 285 n.2, that "an order granting or denying discovery could rarely,

if ever, satisfy this requirement", I have concluded that an interlocutory appeal from the prior order may indeed "materially advance the ultimate termination of the litigation."

As noted above, I believe my prior order respecting discovery to be correct. I must recognize, however, that its implementation will subject the defendants to considerable additional discovery, into areas from which they have thus far rigidly excluded the plaintiff. Assuming *arguendo* that my original order was in error, then there is no reason why the defendants should be subjected to additional, time-consuming, and expensive discovery proceedings.[2]

Furthermore, an appellate ruling, at this time, with respect to the central and significant issues posed by the prior order may well serve as instructive and time-saving guidelines at the trial of the case.

In short, I perceive in this case an appropriate opportunity for "an advance supervisory ruling" in Judge Gurfein's phrase in *Kaufman* v. *Edelstein*, *supra*.

The foregoing discussion is offered with deference, and in recognition that, despite my own conclusions, the Court of Appeals may determine that the appeal should not be permitted. I have attempted to set forth my reasons at some length for whatever assistance they may prove to be.

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[2] Plaintiff also opposes certification on the ground that, far from advancing the litigation, an interlocutory appeal will delay completion of his discovery. Assuming that the Court of Appeals either denies certification, or grants it and affirms this Court's order, it is of course true that plaintiff's discovery proceedings will have been delayed. I see no reason, however, why plaintiff cannot go forward at this time with uncompleted discovery not related to these issues; or why defendants cannot commence their discovery of plaintiff. I gather from the papers submitted to me that the parties agreed to defer discovery of plaintiff until plaintiff had completed his oral discovery of defendants. Whatever considerations underlay that agreement when made, no reason appears why, in the present circumstances, the oral discovery of plaintiff cannot now begin.

ORDER

For the foregoing reasons, it is hereby:

ORDERED, that this Court's prior Memorandum and Order of January 4, 1977 be, and the same hereby is, amended so as to provide that, in the opinion of this Court, such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

It is So Ordered.

Dated: New York, New York
February 22, 1977

/s/ CHARLES S. HAIGHT, JR.
CHARLES S. HAIGHT, JR.
U.S.D.J.